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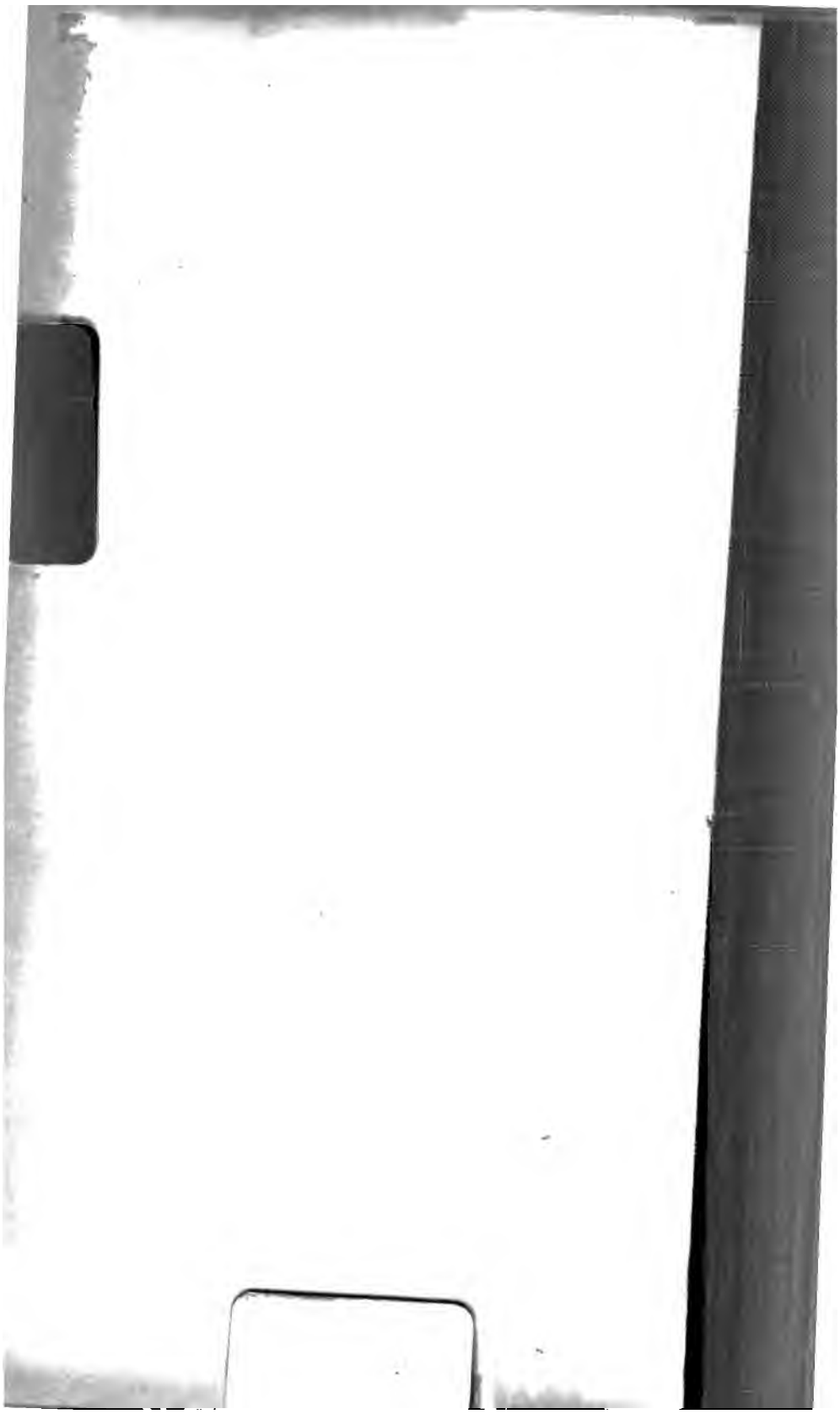

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JUDGES

OF

THE COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir WILLIAM ERLE, Knt., Lord Chief Justice.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.
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CASES

UPON

APPEAL FROM DECISIONS OF REVISING BARRISTERS,

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

XXIII. VICTORIA. 1859.

County of DERBY.—Southern Division.

JAMES MELBOURNE, Appellant; RICHARD WILLIAM GREENFIELD, Respondent. *Nov.* 16.

The "place of abode" of the objector in the notice of objection under the 7th section of the 6 & 7 Vict. c. 18, means that which is his actual place of abode at the time of signing the notice, and not that described in the register.

And a misdescription in that respect is not cured by s. 101, that section only applying where there is an inaccuracy or mistake in the mode of describing that which the party intended to describe.

AT a court held for the revision of the lists of voters for the southern division of the county of Derby, James Melbourne objected to the name of Richard William Greenfield being retained on the list of voters for the parish of All Saints, Derby, in the southern division of the county of Derby. The following is a copy of the notice of objection:—

*"To Mr. Richard William Greenfield.

"Take notice that I object to your name being retained in the [*2 All Saints, Derby, list of voters for the southern division of the county of Derby.

"JAMES MELBOURNE,
"of Cowhill, Belper,
"on the register of voters for the parish or township of Belper.

"Dated, August 15th, 1859."

The appellant's (objector's) name appeared on the register of voters for the township of Belper, and was therein described as follows:—

Name of voter.	Place of abode.	Qualification.	Street, lane, &c., where property situate, &c.
Melbourne, James	Cowhill, Belper	Freehold houses and land.	Gutter.

It was proved in evidence before the revising barrister that James Melbourne, the appellant, had removed from Cowhill, Belper, in October, 1858, to a place called Gutter, in the same township of Belper, and that he was not residing at Cowhill at the time he signed the notice of objection, and described his place of abode "Cowhill, Belper:" and upon this it was contended that the notice of objection so signed was invalid, as not giving the true place of abode of the objector within the meaning of the Registration of Voters Act, 6 & 7 Vict. c. 18.

The revising barrister on that ground held the notice of objection insufficient, and retained the name of the respondent on the list of voters, without requiring proof of his qualification. If he was right in so holding, the name of the respondent was to be retained; otherwise, it was to be expunged from the list.

*3] *The facts proved in reference to several other persons whose names were in a schedule annexed to the case being precisely the same, their names were to be retained in the list of voters or expunged therefrom according to the decision of the court in the principal case: and, the same principle of law being involved, the appeals were consolidated.

Hayes, Serjt., for the appellant.—The question is whether the objector in this case has not sufficiently complied with the direction in the 7th section of the 6 & 7 Vict. c. 18, and in the form given in schedule (A), No. 5, by describing himself as of the place of abode mentioned in the register. The section itself says nothing about the place of abode of the objector: that which is required is only to be collected from the form,—"(signed) A. B., of [*place of abode*], on the register of voters for the parish of ———." Both in the 7th section and in the form, the place of abode of the person objected to is to be "as described in the list:" and there can be no reason why the same mode of description should not apply to both. The 100th section, which enables notices to be sent by post, clearly shows that the place of abode stated in the register or list of voters is the only thing looked to. If it were not so, the party receiving the notice of objection would have no means of knowing whether or not the person objecting is one who has a right to object. [WILLIAMS, J.—It is a choice of difficulties.] Perhaps there is no real difficulty in either case: but a strict adherence to the words will be more convenient. In Gadsby, app., Warburton, resp., 8 Scott N. R. 775, 7 M. & G. 11 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 136, a notice of objection was signed J. G., of Poplar Grove, Didsbury, on the register of voters for the township of Manchester,"—Didsbury being a *township* near Manchester, and the description of the party

*4] *being the same as in the register,—was held sufficient. Maule, J., there says,—8 Scott N. R. 781,—"That which is meant there [schedule (A), No. 5] is, a description of the party's place of abode as it appears on the register; for, the main object is, to show that the barrister has jurisdiction to try, and that the objector has a right to object to the voter's name being on the list; and for this purpose it is

necessary that the voter should have the means of identifying the objector as a person who is on the register: and it is convenient, therefore, that the description in the notice should correspond with that upon the register. Whether or not, in case of a change of abode of the objector, since his name was placed upon the register, it would be requisite also to insert in the notice his present residence, it is not necessary to determine: the inclination of my mind is that it would not be necessary. The expression in the sched. (A), No. 5, is, 'A. B., of [*place of abode*],' &c., which is rather descriptive of the residence of the party than of the place the notice is sent from. In the notice to the overseers (No. 4), the word 'of' does not appear; the signature is to be simply thus,—'A. B. [*place of abode*].' It might be that the one was intended to give the *present* place of abode, and not the other. But, at all events, I think this form No. 5 is sufficiently complied with by giving the place of abode that appears upon the register." And Erle, J., said: "I apprehend there can be no doubt that the place of abode required to be inserted in the register by the 2 W. 4, c. 45, is a sufficient description of the place of abode for a notice of this sort. It seems to me to be most material that the same description should be given in both." In Pruen, app., Cox, resp., 2 C. B. 1 (E. C. L R. vol. 52), 1 Lutw. Reg. Cas. 441, in a notice of objection, the objector described himself as of "No. 398 High Street, Cheltenham, on the register of voters *for the parish of Cirencester:" on the register so referred to, the objector was described as of "Cheltenham" only; and it was held that the notice was sufficient. [ERLE, C. J.—What has the party objected to, to do with the residence of the objector?] Nothing. [WILLIAMS, J.—It is suggested in Cockburn's Election Law, p. 97, that it may be requisite to have the true place of abode of the objector, so as to get a remedy against him if the objection turns out to be frivolous.] Everybody knows that the remedy in these cases is anything but substantial. In Knowles, app., Brooking, resp., 2 C. B. 226 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 461, the majority of the court,—Tindal, C. J., Coltman, J., and Erle, J.,—held a notice to be sufficient which described the objector as of his true place of abode. But Maule, J., in a very elaborate judgment, expressed his dissent from that conclusion. The question there turned upon the notices Nos. 10 and 11 in schedule (B), applicable to borough voters; but it involved precisely the same principle. Tindal, C. J., says,—2 C. B. 231,—"It appears to me, that, looking at the concluding words of those two forms, they do not in any manner qualify the sense of what had preceded, namely, 'place of abode,' nor in any manner refer to the place of abode contained in the list of voters; but that the whole sentence is *satisfied*, if the true place of abode of the objector at the time of giving the notice is inserted therein. The words between the parentheses are only 'place of abode;' words which, taken absolutely and by themselves, and in their natural sense, would denote the then place of abode of the party objecting; for, the words between the parentheses are not 'place of abode on the list of voters,' which would necessarily require the construction contended for by the appellant; nor are the words 'as on the list of voters,' which latter form would have also necessarily required the same *construction: but the words within the parentheses are simply 'place of abode,' and the words that follow contain a separate and distinct

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proposition that such *name*, not such *place of abode*, is to be found on the list of voters." Again, at p. 233,—"The words 'on the list of voters' appear to me to be no more than a direct allegation of the existence of the fact which has been made essential by the 17th section, namely, that the objector's name is on the register for the county, or the list of voters for the borough (as the case may be), a fact the truth of which may be determined by the overseers by reference to the register or list, of which a copy is in their custody; or by the party objected to, by his inspecting such register or list, which he is empowered by law to do." Maule, J., who goes very minutely into the question, says: "It was not denied on the part of the respondent, that the notices in question ought to contain an assertion of the right to object; but it was contended that that right was sufficiently stated in the words 'on the list of voters for the parish of ———;' and that the preceding words 'A. B., of [*place of abode*],' were not intended as a statement of the name and addition of the objector as inserted in the list, but of his name and addition at the time of signing the notice. It is material, on this part of the discussion, to observe that the immediate subject of inquiry is, what is the meaning of a notice filled up according to the form; for, it is such notice, and not the form itself, that is sent to the party objected to. The want of adverting to this has, I think, produced some confusion. The form of notice has the words 'place of abode' in italics, within parentheses, between the words 'A. B., of,' and the words 'on the list of voters:' but these parentheses are not to be retained in the notice when drawn, but are only meant to show that the words *7] within them are not to be the very words in the notice, but are *only a direction as to what those words shall be. This is manifest from the word 'of' in the form not being within the parentheses; so that a notice drawn according to the form would, to take an example, for the sake of clearness, run thus,—'John Smith, of Broad Street, on the list of voters for the parish of St. Mary,' without any parentheses. And the question is, how a notice in these words should be understood. It is a mistake to treat it as if the parentheses were retained. It is to be observed that the right to object does not, since the act of Victoria, depend on the right to vote, or the right to be on a list; for, a persor may have a right to vote or to be on a list, and yet have no right to object, if, in fact, his name is not inserted in a list; or he may have no right to vote or to be on a list, and yet may have a right to object, in respect of being in fact on a list. The right to object, therefore, being entirely dependent on some one entry in a list of voters, whether the name and place of abode be correctly stated in such entry or not, it seems to me that such construction of the forms is more conformable to the general rules of law, and to the intention of the act of Victoria, which requires the notices to point out, distinctly, which of all the entries in the list is that which is relied on as the foundation of the right to object; thus, not merely claiming the right, or making a general assertion, from which it might be inferred, but (in conformity with the rule which prevails with respect to the exercise of powers or authorities by writing) showing, in particular, the fact on which the right depends, and enabling the voter to ascertain, by a simple inspection of the list referred to, whether the right to object which is relied on does really exist. A minute consideration of the terms of a notice drawn according to the form confirms this

construction; the natural and obvious meaning of the words 'on the list *of voters for the parish of St. Mary,' following the words 'John Smith, of Broad Street' (to use the same example as before), is, [*8 that 'John Smith' and 'Broad Street,' are mentioned in the list as the name and place of abode of a voter, and not that the objector is a person whose present name and place of abode are 'John Smith, of Broad Street,' but whose name and place of abode on the list may be the same or different. It can hardly be denied, that, in the absence of parentheses, the words 'on the register of voters for the parish of St. Mary' are left to operate, in like manner, on the whole clause which precedes them,—'John Smith, of Broad Street,'—or they operate on no part of it; for, it seems very difficult to contend that they operate differently on the words 'John Smith,' and on the intervening words 'of Broad Street,' so as to mean that the name of the voter on the list was 'John Smith,' but not to mean that the place of abode on the list was 'Broad Street;' and, accordingly, it was argued for the respondent that the words 'on the list,' &c., did not import that either the name 'John Smith,' or the place of abode 'Broad Street,' was mentioned on the list; and that is, certainly, a more reasonable construction than that which treats the words 'on the list,' &c., as operating on the words 'John Smith,' and as having no operation on the intervening words 'of Broad Street;' which construction seems to rest on a tacit but erroneous application of the parentheses which are found in the form, to the words of the actual notice, in which they are not found. That the notice is to be understood, not merely as affirming that the objector is on the list of voters, and therefore has a right to object, but as referring to a particular entry, is further confirmed by the forms requiring the notices to specify the particular list on which the objector is to be found. If it were intended as a mere assertion *of a right to object, it would be sufficient to state that the objector [*9 was on a list of voters for the borough, and, in the corresponding case in counties, that the objector was on the register, without saying, as is required by schedule (A), No. 5, for what parish. As the particular list is referred to, it is natural that the particular entry itself should also be referred to, each reference being in furtherance of the same object. It was contended for the respondent, that, by the construction contended for by the appellant, a voter who might wish to communicate with the objector, might be prevented doing so in the case of an objector whose present place of abode was different from that on the list referred to, whether this difference arose from error or from change. But it is doubtful whether the act contemplated any such communication: it does not authorize or require it; it imposes no duty to make, nor confers any right on the maker of, any such communication. But, if it did contemplate such communications, such communications must probably be very rare. The cases of error and change are a very small portion of the whole number of cases; and such errors or changes as would prevent the objector being reached by a letter directed to him at his abode as mentioned in the list, must be a very small portion of the whole number of cases of error and change: and it may be observed, that, in the case in judgment, no such inconvenience did arise. The legislature, in the much more important case of the service of a notice of objection,—the giving of which is essential to the object-

or's right, and the receipt of it to the voter's defence,—has considered that it is sufficient to send the notice to the abode mentioned in the list. Indeed, the general scope of the act of Victoria seems to be, that, for all purposes connected with registration, the description on
*10] the list, both by name and place of *abode, shall be taken to be the true description." And, towards the close of his judgment, speaking of the relative convenience of the two constructions, the learned judge says,—"With regard to the comparative convenience in practice of the two constructions, there seems no doubt that that of the appellant is to be preferred. It enables the party objected to, and the revising barrister, easily to ascertain by inspection of the notice and list, without any extrinsic evidence, whether the notice is sufficient, inasmuch as, on this construction, where the place of abode in the notice is the same as on the register, no question of law or fact can be made as to its validity; whereas, if the respondent's construction is to prevail, many questions of law may probably arise as to what is a sufficient description in the notice of the place of abode,—whether the county, parish, or post-town is to be mentioned: and these will be the more numerous and doubtful, from the uncertainty of what the object was for which the insertion of the present place of abode was required by the act; and in all cases it must be a matter of evidence, and may be one of controversy, before the revising barrister, whether the place of abode be in fact truly stated in the notice. It was also suggested that the identification of the voter by his place of abode on the list would be unnecessary in a notice of objection, except in the case of two voters of the same name being on the list: but this is no answer to the argument arising from the convenience of the rule requiring identification by Christian name, surname, and place of abode: all three may be necessary in some cases, and they are required in all, for the sake of uniformity, simplicity, and convenience." [CROWDER, J.—The judgment of Erle, J., in that case is very cogent. What would a man of
*11] ordinary understanding, looking at this schedule, understand *that he was to do? It must be observed that there is a marked distinction between the requirement as to the place of abode of the objector and that of the person objected to.] No case has ever decided such a notice as this to be bad. If the thing answers the purpose of a notice, it must be quite immaterial which mode of description is adopted. At all events, this can be no more than an inaccuracy of description, which the revising barrister had power to amend under s. 101. That section provides that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice as to be commonly understood." That shows that technical objections are not intended to prevail, but that it is enough if the description is such that it cannot mislead the person to be affected by it. [ERLE, C. J.—Has any case decided that that provision applies to a case where the description given is that which was intended to be given?] Not precisely; but it is generally assumed that the notice will be upheld where it answers the purpose for which it is given.

Macnamara, for the respondent.—It must now be taken to have been

definitively decided, by the opinions of the majority of the Court in Knowles, app., Brooking, resp., that the notice of objection must give the true place of abode of the objector at the time of giving the notice. And there is good reason for so holding; for, in the county lists, the place of abode of the party does not appear at all: it merely designates the qualifying property. The voter may be in Australia, or *"travelling abroad,"—Walker, app., Payne, resp., 2 C. B. 12 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 325. In Toms, app., Cuming, resp., 8 Scott N. R. 910, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200, Maule, J., gives much the same reason for requiring the true place of abode as is given in Cockburn's Election Law. And in Woollett, app., Davis, resp., 4 C. B. 115 (E. C. L. R. vol. 56), 1 Lutw. Reg. Cas. 607, Wilde, C. J., says: "By this enactment, the legislature plainly intended that the notice to be given should therein set forth all the requisite particulars to inform the party to whom the notice was to be given, of the place of abode of the objector: and it should be observed that voters for counties, in respect of property qualifications, are not, like voters for boroughs, restricted as to the place of their residence." [WILLIAMS, J.—The description there per se was clearly insufficient; and the court held that the misdescription could not be aided by coupling the notice with the register.] There is good reason why the objector should be required to give his *own* true place of abode, which he must know: and the inconvenience which would result from a contrary decision is abundantly pointed out in the judgment of Tindal, C. J., in Knowles, app., Brooking, resp., already referred to, as well as in that of Erle, J., who says,—"The appellant's contention that the words 'on the list of voters,' &c., apply to the place of abode, and that the form in question is to be understood to mean 'A. B., described on the list of voters to be of the place of abode,' appears to me to be open to several objections. First, that the words must be altered before they express this meaning; whereas, they are capable of a sensible application without any alteration. Secondly, when so altered, they contain an immaterial statement; whereas, if applied to the person, they are material to show his qualification. Thirdly, it gives different meanings to the same words in two acts in pari materiâ. And, *fourthly, if the described place of abode had been intended, these words would have been used, for they are used on several occasions in both statutes, where the writer of a notice is referred to the list for the place of abode of another person whom he may not know otherwise than from the list; but the words in question in other instances denote the true place of abode of the writer, which he is presumed by the legislature to be able to give without difficulty. I cannot discover any good effect from requiring the place of abode as described in the list, instead of the true place. If communication is contemplated, the true place is best. If the name occurs only once, the identity is clear, without referring to place. If the name occurs twice, the objector is identified at the revision, which is as early as can be useful, if no communication is intended. If pretended objectors are to be guarded against, there would be no security from requiring the place to be transcribed." [WILLIAMS, J.—If the place of abode at the time of giving the notice were inserted, would not that give rise to a difficulty in ascertaining whether the party objecting is qualified to object?] That difficulty is adverted to in the judgment in Knowles,

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app., Brooking, resp. [Williams, J.—In Hinton, app., Hinton, resp., 8 Scott N. R. 995, 7 M. & G. 163 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 259, it was held that whether or not the name subscribed to a notice of objection is so subscribed as to be commonly understood to be the same as that by which the objector is designated in the list of voters, is a question of fact only, and not of law, and therefore one that cannot properly be referred to this Court. There, the notice of objection was signed "William Nicholas;" and in the list of voters "William Nickless." Byles, J.—Suppose the objector has changed his name since the making of the list, how is he to describe himself?] By the name *14] *which he bears at the time of giving the notice. [Williams, J. —Would the notice be bad, if he signed his name as it appeared on the register?] Clearly it would. Then, this is not a case of inaccurate description, so as to be aided by the 101st section. It is clear, that, when Mr. Melbourne wrote "Cowhill, Belper," he did not intend to describe "Gutter" as his place of abode. In Gadsby, app., Warburton, resp., there was no false statement: the only question was, whether the notice should not have been more explicit. The opinion there intimated by Maule, J., has since been dissented from and overruled: the true doctrine is to be found in Knowles, app., Brooking, resp. Reason and convenience imperatively require that the true place of abode, and that alone, should be given.

Hayes, Serjt., in reply.—The whole matter is so thoroughly sifted in the judgments given in Knowles, app., Brooking, resp., that nothing more can be said. The notion that personal communication was contemplated is perfectly idle and illusory. That case still leaves it an open question how the party must describe himself where there has been a change of abode. It is submitted that the one will answer the purpose the legislature had in view as well as the other. [Byles, J.—What do you say to the case put as to the change of name?] It is submitted that the objector could only sign a valid notice with the name by which he appeared on the register,—unless, indeed, he signed both. At all events, the inaccuracy is aided by the 101st section. In Feddon, app., Sawyers, resp. 12 C. B. 680 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 246, Tindal, C. J., says,—"The 101st section, I think, affords some light: it enacts, &c. I think the fair meaning of that section is, that, in dealing with these notices, we are not to put a mere technical *15] and critical construction upon them, but to look at *them as persons of plain common sense would read them: and, if we see that the objector in his notice so describes himself as that any man of ordinary intelligence may understand what he means, the notice is a sufficient compliance with the act." [Williams, J.—There the party did not describe that which he meant to describe. Here he has.] He meant to describe his place of abode as the act of parliament required him to describe it, and, instead of "Gutter" he writes "Cowhill, Belper." [Williams, J.—He clearly did not mean in the notice to describe his present place of abode. Erle, J.—The objector has fallen into no mistake of fact: he has merely misapprehended a requirement of the law.]

Erle, J.—I am of opinion that the decision of the revising barrister in this case was right. The objector is bound by the act of parliament to give in his notice of objection his "place of abode." The question

which has been argued before us is, whether, seeing the way in which those words appear in the act, they mean his place of abode as mentioned on the register, or his true place of abode,—his then or his present place of abode. I am of opinion that the words used would in their ordinary acceptation mean the present place of abode of the party. I think it was a decided question at the time the case of Knowles, app., Brooking, resp., was before the court. It was there decided by the majority of the court, and thus became res judicata, that a notice of objection, pursuant to the 6 & 7 Vict. c. 18, s. 17, sched. (B), Nos. 10, 11, signed by the objector with the addition of his true place of abode, was sufficient, notwithstanding it differed from that erroneously placed against his name in the list of voters. I am at a loss to see how it can be said that the legislature meant by the words "place of abode" either the place *of abode described in the register, or the true place of abode, at the option of the party. I think that, it having been [*16 decided in that case that the insertion in the notice of the present place of abode of the objector is a compliance with the act, I should be conflicting with that decision if I held that the insertion of the past place of abode would also be a compliance with the act. It would be giving an unreasonable construction to the statute to hold that the objector has the option of using either his present or his late place of abode. At all events, that being a matter which has been decided on great deliberation, I adhere to it. I observe that the relative conveniences of the one construction and of the other were gone into with elaborate minuteness by the Lord Chief Justice Tindal on the one side and Mr. Justice Maule on the other. I took part in the decision, and concurred in the view taken by the majority of the court. But I do not say, that, if it were res nova, I should not be disposed to be astute to put such a construction upon the notice as would make the document valid, seeing that nobody has been misled by it. As to the 101st section, we should be running counter to what has in numerous cases been held to be the true construction of the provision that "no misnomer or inaccurate description of any person, place, or thing named or described in any schedule to the act annexed, or in any list or register of voters, or in any notice required by the act, shall in anywise prevent or abridge the operation of the act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood," if we were to hold it to be applicable to a case where the party distinctly intended the place of abode he has put down, and made no mistake therein in the way of misnomer *or inaccurate description, but merely mistook [*17 the requirement of the law. For these reasons, I am of opinion that the decision of the revising barrister is right. I say nothing about the comparative advantages or disadvantages arising from either construction; for, it is impossible to add anything to the arguments urged in Knowles, app., Brooking, resp., by Tindal, C. J., on the one hand, and Maule, J., on the other.

WILLIAMS, J.—I am entirely of the same opinion.—The point arises upon the construction of the form No. 5 in schedule (A); the question being, what is the meaning of "place of abode" in the form there given. It seems to me to be abundantly clear that it must mean either the place of abode as described in the register, or the present place of abode

of the person objecting. It never could have intended either the one or the other, at the option of the party. It is for us to decide which of the two it means. If the matter were free from authority, I should have no hesitation in holding that the natural meaning of the words "place of abode" in the form in question, as well as in No. 4, is the *present* place of abode. If authority were wanting, that of the case of Knowles, app., Brooking, resp., is clear and direct. It was there held, that it is sufficient to state the true place of abode. If it be sufficient, it can only be so because the legislature meant it; and, if they meant that, they could not have meant that the objector was at liberty to describe himself by his place of abode as given in the register. That case, therefore, is an authority for our holding that the notice which has been given in this case is not in conformity with the statute. Then it is said that the objection is cured by the 101st section of the act, which provides that "no misnomer or inaccurate description of any person, place, or thing named or *described in any schedule to this act annexed, or in any list or register of voters, or in any notice required by this act, shall in anywise prevent or abridge the operation of this act with respect to such person, place, or thing, provided that such person, place, or thing shall be so denominated in such schedule, list, register, or notice, as to be commonly understood." For the purpose of this point, it must be assumed that the law is, that the objector should in his notice describe himself as of his present place of abode. I understand the meaning of this provision in the 101st section to be, that, if the objector intended to comply with the act, and intended to describe his present place of abode, notwithstanding any mistake or inaccuracy in the mode of doing it, such mistake would not invalidate the notice, provided the description were such as to be commonly understood. But that clearly has no application to a case like this, where the party confessedly did not intend to describe his present place of abode, but intended to describe something else.

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Crowder, J.—I must own that I have been unable during the argument which has been urged on the part of the appellant to entertain any doubt, whether the question is looked at with reference to the 7th section of the statute and the form given in schedule (A) alone, or whether it is looked at with the aid of the authorities which have been decided upon it. Any person looking at the statute and at the form referred to (No. 5),—which is to be signed "A. B., of [*place of abode*], on the register of voters for the parish of ———," would naturally understand the meaning of that direction to be, that the person so signing the notice must describe himself as of his true place of abode at the time he so signed it. Very great ingenuity has been exercised for the purpose of showing *that the statute means something different; and several authorities have been referred to. I agree with my Lord that the case of Knowles, app., Brooking, resp., contains every argument which could be urged on the one side and on the other by two of the most learned and acute lawyers who ever sat upon this bench,—the late Lord Chief Justice Tindal and Mr. Justice Maule: and I may say, that, in addition to what was said by the former of those two learned judges, we have the very cogent arguments of the present Lord Chief Justice, who on that occasion concurred with the view taken by the Lord Chief Justice Tindal. And I must say that I think there is a

*19]

great deal of good sense and sound argument on the side of the majority. But, in either view, that case utterly destroys the argument which has been urged before us to-day by my Brother *Hayes*, viz. that it is optional with the objector to describe himself either of his place of abode as stated in the register or of his present and true place of abode; for, there the whole court were agreed that there was only one place of abode which could be inserted, though they differed as to which that one should be. The authority of that case is conclusive. I do not consider it necessary to go into the question of the balance of convenience of the one view or the other, though I must confess I should have had little difficulty in deciding with the majority. It is expedient to adhere to that decision. As to the other point,—which was a mere straw caught at by the learned Serjeant to prolong the struggle,—the authorities clearly show that the 101st section of the 6 & 7 Vict. c. 18, never was intended to apply to such a case as this. The inaccuracy of description there referred to is an inaccuracy or imperfection in the mode of describing that which the party intended to describe. Notwithstanding all the ingenuity which was brought to bear *upon the argument in Knowles, app., Brooking, resp., both at the Bar and [*20 by the several members of the court, it was never for a moment suggested that the defect could be cured by the 101st section: and, though I do not say that that is or ought to be conclusive, it is at all events well worthy of consideration. Here, the objector intended to describe his place of abode as he has done: he did not write "Cowhill, Belper," by mistake for "Gutter;" but, mistaking the place of abode intended by the statute, he designedly described himself as of his late, instead of his present, place of abode. I am clearly of opinion that the decision of the revising barrister was right, and must be affirmed.

BYLES, J.—I entirely concur in the conclusion at which my Lord and my two learned Brothers have arrived: and I place my judgment entirely on the weight of authority. The case of Knowles, app., Brooking, resp., has decided that the "place of abode" meant to be given by the objector in the forms numbered 4 and 5 in schedule (A) is, his true place of abode at the time he signs the notice. Further, I think that that case has also impliedly decided the other question, viz. that the 101st section is inapplicable. On the ground, therefore, that this is res judicata, I agree with the rest of the court in thinking that the decision of the revising barrister should be affirmed.

Decree affirmed, with costs.

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*SOUTH LANCASHIRE.—Township of MANCHESTER. [*21

JOSEPH SHERLOCK, Appellant; JOHN STEWARD, Respondent.

Nov. 19.

A. and several other persons claimed to be registered for a county as the owners each of an undivided thirty-fifth share of freehold property producing a net rental sufficient to give to each of them 2*l.* 0*s.* 6*d.* per annum. This was reduced below 40*s.* to each owner by the allowance of a commission of 5*l.* a year to one of the thirty-five, who undertook the management of the property and the transmission to each of the others of his share. The revising

barrister having found that "the allowance of such commission was, from the nature of the property, *necessary* for the collection of the rents,"—Held, that the court was bound by his finding, and therefore could not say that the claimants had freeholds of the clear yearly value of 40*s*.

But, the case being fairly arguable, costs were not given.

AT a court held for the revision of the lists of voters for the southern division of the county of Lancaster, on the 20th of September, 1859, John Steward objected to the name of Joseph Sherlock, jun., being retained in the Manchester list of voters for the southern division of the county of Lancaster.

The said Joseph Sherlock was entitled to one undivided thirty-fifth share in property in Bloom Street and Richmond Street, Manchester, the gross rental of which was 110*l*. 14*s*. 4*d*. The out-goings for the year ending on the 31st of July, 1859, amounted to 39*l*. 17*s*. 6*d*., without including the sum of 5*l*. hereafter mentioned,—leaving 70*l*. 16*s*. 10*d*., or about 2*l*. 0*s*. 6*d*. per share.

The property was managed by one of the owners, who was allowed a commission of 5*l*. per annum for receiving the rents and transmitting to each owner his share; and which sum being deducted from 70*l*. 16*s*. 10*d*. left less than 40*s*. per share.

It was objected that the property did not produce a clear 40*s*. per share to the several owners.

The revising barrister found that *the allowance of such commission was, from the nature of the property, necessary for the collection of the rents;* and he thought that such allowance was a charge reducing the clear yearly value of the property to each of the owners to a sum below 40*s*., and therefore struck out the name of *the appellant and twenty-one other owners of shares in the property.

*22]

If this objection was a good one, the decision was to be affirmed; if not, the names of the appellants (Joseph Sherlock and the other twenty-one owners) were to be restored to the register.

Welsby, for the appellant.—The decision of the revising barrister was wrong. It will be attempted to be supported by the case of Hamilton, app., Bass, resp., 12 C. B. 631 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 213. There, A. was registered as a county voter in respect of an undivided thirtieth share of certain freehold property which was let at a gross yearly rent of 75*l*. 15*s*., with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63*l*. 3*s*. 7*d*., and there was a further charge of 1*l*. 6*s*. for expenses of collection. The average annual expenses of repairs, which were done by the landlords, and which the revising barrister found were necessary to enable them to obtain the net rent of 63*l*. 3*s*. 7*d*., had for the preceding six years been 4*l*. per annum. The revising barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was of less than the value of 40*s*. by the year, and he expunged his name from the list: and it was held that he had correctly decided. That case turned upon the question of repairs; nothing was said as to the expenses of collection. The true criterion is, what is the property worth? what would it produce in the hands of a tenant? The expenses incident to the collection of the rents are not to be charged as a deduction from the yearly value of the property, any more than the salary of a steward

would be, or the expense of an audit dinner. The question is, whether the parties are *entitled to receive from the property 40*s.* a year over and above all rents and charges payable out of or in respect of the same. Here, each is entitled to receive 2*l.* 0*s.* 6*d.* a year. [CROWDER, J.—Astbury, app., Henderson, resp., 15 C. B. 251 (E. C. L. R. vol. 80), 1 K. & G. 6, shows that the true test is, what would a tenant give for it.] Jervis, C. J., there says,—"The true question is, what is the land reasonably worth? what would it fetch in the market?" [CROWDER, J.—In Beamish, app., The Overseers of Stoke, resp., 11 C. B. 29 (E. C. L. R. vol. 73), 2 Lutw. Reg. Cas. 189, Maule, J., in the course of the argument, puts this case,—"Suppose a man agreed to stand in the claimant's shoes,—would it be worth his while to give 40*s.* a year for his interest in the land?" WILLIAMS, J.—The revising barrister has found that the employment of a collector was from the nature of the property necessary.] That means that it would probably cost each of the parties more than the value to collect the rents themselves. The revising barrister, in using that expression, could not have intended to point to a physical or moral necessity. The appellant is clearly entitled to be upon the register. [*23

Monk, Q. C., for the respondent.—It is not contended that the expense of collection is a "charge" upon the property. It is a question of fact, and purely of fact, whether the party has 40*s.* to expend by the year. By the 8 H. 6, c. 7, s. 1, it was "provided, ordeined, and stablished," that "the knights of the shires to be chosen within the realm of England to come to the parliament of our lord the king hereafter to be holden, shall be chosen in every county of the realm of England by people dwelling and resident in the same counties, *whereof every one of them shall have free land or tenements to the value of* 40*s.* *by the year at the least above all charges;* and that they which shall be so chose shall be dwelling and resident within the same *counties: and such as have the greatest number of *those that may expend* 40*s.* *by the year and above* as afore is said, shall be returned by the sheriffs of every county knights for the parliament, by indentures sealed between the said sheriffs and the said choosers so to be made; and every sheriff of the realm of England shall have power, by the said authority, to examine upon the Evangelists every such chooser how much he may expend by the year, &c." By the 10 H. 8, c. 2, the qualification is declared to be freehold to the value of 40*s.* by the year at the least *above all charges.* And the 18 G. 2, c. 18, s. 5, enacts that "no person shall vote in any such election, without having a freehold estate in the county for which he votes, of the clear yearly value of 40*s.* over and above all rents and charges payable out of or in respect of the same." Here, the parties interested in this property have not an estate of the clear yearly value of 40*s.* over and above all charges payable out of or in respect of the same. The cost of collection is an expenditure to create the value, just as rates and taxes and repairs are, and it is found by the revising barrister to be a necessary expenditure,—a very reasonable finding, if the court *can* inquire into its reasonableness. The judgment of the court in Hamilton, app., Bass, resp., 12 C. B. 631 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 213, is conclusive. Jervis, C. J., says: "The real question to be decided is not as to the meaning of the word 'charges' in the 8 H. 6, c. 7; for I do not think a mere voluntary payment can [*24

be said to be a 'charge.' But the other point arises, which was decided in the case of Lee, app., Hutchinson, resp., 8 C. B. 16, 2 Lutw. Reg. Cas. 159. The question is, what is the property worth? And the proper way to try that, is, to ascertain what a tenant would give if he himself expended 4*l.* a year in repairs. The revising barrister finds, that,
*25] if the sum expended *for necessary repairs to enable the owners to obtain the rent of 63*l.* 3*s.* 7*d.* be deducted, the share of each is of less than the value of 40*s.* per annum. The question whether or not the premises are of the yearly value of 40*s.* is in each case a question of fact, to be determined by all the surrounding circumstances. Here, the barrister has found the fact, and I think correctly." Maule, J., in the course of the argument, there asks,—"If a man has a piece of land by means of which he can enable himself to expend 40*s.* a year, by laying out 5*s.* upon it, can that be said to be of the *value* of 40*s.* by the year? Take that with the finding of the revising barrister here, the parties have each an estate of the yearly value of 2*l.* 0*s.* 6*d.*, subject to a *necessary* expenditure of 3*s.* to produce it. This is as much an expenditure as the seed or the manure which must be expended before the productiveness of the land can be ascertained. In Moorhouse, app., Gilbertson, resp., 14 C. B. 70 (E. C. L. R. vol. 78), 2 Lutw. Reg. Cas. 260, it was held that one who has a freehold interest in property of the value of 40*s.*, but subject to an agreement to pay thereout a poor-rate charged upon his tenant in respect of the premises, has not a freehold of the "clear yearly value of 40*s.*," so as to entitle him to a vote for the county. Maule, J., says: "The interest which the voter has in the premises is, 40*s.* a year, subject to his agreement with the tenant to pay a charge which the tenant alone was liable to pay, viz. the poor-rate. With that stipulation, the interest of the voter is worth less than 40*s.* per annum. He does not get 40*s.* out of the land, but 40*s.* subject to the payment of a rate for which he has no equivalent." And Williams, J., says: "Mr. James was almost driven to admit that he must go the length of contending that a man would be entitled to vote, who could say, not that his freehold is worth 40*s.* a year, but that it would be worth that if it were not situate in a parish where the rates are so heavy."

*26] *Welsby*, in reply.—Rent is not the test, but *value*. The illustrations put in the cases cited are all instances of compulsory payments in actual diminution of the value of the land. Suppose this person had to ride through a turnpike-gate in order to obtain his 40*s.*, would that be a deduction which would be taken into account in diminution of the yearly value?

ERLE, C. J.—I think the decision of the revising barrister in this case was correct, that is, that my judgment concurs with his by reason of the fact which he has stated, that the allowance of the commission of 5*l.* per annum for receiving the rents, was, from the nature of the property, *necessary* for their collection. The appellant claims to be entitled to vote because he is possessed of a freehold estate of the clear yearly value of 40*s.* over and above all rents and charges payable out of or in respect of the same, or of which he may expend 40*s.* by the year at the least above all charges. That which we have to look to, therefore, is, to see that the party has an estate of the clear yearly value of 40*s.* Now, it is found by the revising barrister that the several owners of this property could not obtain the 40*s.* a year each which is

required by the statutes, without incurring a *necessary* expenditure of a sum for its collection which would reduce the yearly value to each to a sum less than 40*s*. If this reduction was the result of a necessary outgoing, it is clear that the parties have not 40*s*. by the year which they may expend. The illustrations put by Mr. *Welsby*, of a landlord employing a steward at a salary to collect his rents, or giving a rent-dinner to his tenants, are cases where the expenditure is unnecessarily incurred; the employment of a steward or the giving a dinner being purely optional, and the landlord would still receive his 40*s*., though he might choose to expend a portion *of it in the manner suggested. [*27
But here the revising barrister has found as a fact that the allowance of the commission for the collection of the rents was, from the nature of the property, *necessary*,—that is, as I understand it, that, but for the allowance which reduced the value to each of the owners below 40*s*. a year, he would not be in a position to expend 40*s*. by the year.

WILLIAMS, J.—I am of the same opinion. I think we are bound in this case by the finding of the revising barrister, which in effect amounts to this, that these persons had not a freehold estate of the yearly value of 40*s*. Upon the facts found, the rental does not represent the actual value of the property, because, according to the facts presented to us by the revising barrister, we must necessarily deduct from the 2*l*. 0*s*. 6*d*., the proportion of the cost incurred in the collection, which will reduce the annual value to a sum less than 40*s*. I must confess I have some difficulty in conceiving a case where such an expenditure as this can be *necessary*, in the sense in which that word is used here: but, as I cannot say it is impossible that that can be so, I feel myself bound by the statement I find in the case. At the same time, I must not be understood as holding generally that the expenses of collection are to be considered a charge on the property, and to be deducted in estimating the yearly value. In general, the rental represents the yearly value: and the yearly value cannot vary as the landlord may or may not, in order to save himself the trouble and inconvenience of doing it himself, employ a collector to perform that service for him. Here, the expense is incurred, not for the mere purpose of avoiding trouble and inconvenience; but because, as the revising barrister has found, it was necessary. I think we are bound by his finding.

*CROWDER, J.—I am of the same opinion. I think the revising barrister has come to a right conclusion from the premises. The [*28
argument of Mr. *Welsby* would go to show that the facts are inaccurately stated, because he insists that the employment of a person to collect the rent was a voluntary act on the part of the landlord. The revising barrister states that the employment of a collector was from the nature of the property necessary. If he had found that the employment of the collector was a voluntary act, for the mere convenience of the landlords, the expense thus incurred would not go in reduction of the rental. But he has found that it is necessary; and we have no means of judging whether that is so or not, and therefore cannot come to the conclusion that he is wrong. If it be a necessary expenditure, it must go in reduction of the yearly value, because without it the property would not produce to each owner the requisite value to give the franchise. The decision must therefore be affirmed.

Monk, for the respondent, asked for costs.

Erle, C. J.—We think this was a reasonable case for argument, and therefore that there should be no costs.(*a*)

Decision affirmed, without costs.

(*a*) In affirmance of the rule suggested by the court in Clark, app., The Overseers of Bury St. Edmunds, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), 1 K. & G. 90,—that, where the decision upon an appeal is adverse to the claim of franchise, the court will grant or withhold costs according as they see that there was reasonable ground for the appeal; but that, where the decision against the appellant supports the franchise, costs will be given as a matter of course.

*29] *Borough of READING.

THOMAS ROGERS, Appellant; CHARLES EDWARD LEWIS, Respondent. *Nov.* 19.

In the case of an occupation of premises in succession, under the 2 W. 4, c. 45, s. 28, it is not necessary that the party's name should appear on the rate: it is enough that he has *paid* the rate.

And, *semble*,—per Erle, C. J.,—that the occupier is sufficiently rated, though the name of the owner of the premises only appears in the rate, a blank being left for that of the occupier,—where the latter is the person *intended* to be rated.

Quære, whether the *omission* of the occupier's name from the rate is an "inaccurate description," within the 75th section of the 6 & 7 Vict. c. 18? *Semble*, that it is not.

At a court held for the revision of the list of voters for the borough of Reading, Henry Pocock objected to the name of John Jones being retained on the list of voters for the parish of St. Giles.

John Jones occupied a house in Crown Street till December, 1858, and was duly rated in the October rate, the only one made between July, 1858, and the end of his occupation. He moved in December to a house in Boult's Walk. He claimed to be registered in respect of "houses occupied in immediate succession," in "Crown Street, and Boult's Walk, Whitley Street."

Another rate was made in April, 1859, on which his name did not appear. He made no application to be rated: but the collector called on him, and he paid the rate, for which the collector gave the usual receipt. The house mentioned in this rate,—in Boult's Walk,—is that for which the claim was made.

The following is a copy of the rating in the parish book:—

"Parish of St. Giles, Reading.

"Rate made the 21st day of April, 1859.

No.	Name of occupier.	Name of owner.	Description of property rated.	Name or situation of property.
365		Haslem, James	House.	Boult's Walk.

It was contended that the rating for the house to which the voter had removed was not necessary; and that, if it was, the payment of the rate to the collector, under the circumstances stated, was equivalent to a demand to be rated.

*The revising barrister held that the rating to the second house was necessary; and that the payment to the collecter was not equivalent to a demand to be rated: and he expunged the name of John Jones from the list. [*30

If the court should be of opinion that this decision was wrong, the name of John Jones was to be restored to the list.

Dowdeswell, for the appellant.(a)—Under the 2 W. 4, c. 45, s. 28, rating was not necessary; and, if necessary, the voter was sufficiently rated; or, at all events, the defect is cured by the 75th section of the 6 & 7 Vict. c. 18. The question turns mainly upon the construction of the 27th and 28th sections of the Reform Act, 2 W. 4, c. 45. The 27th section enacts "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being, either separately or jointly with any land within such city, borough, or place, occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough: Provided always, that no such person shall be so registered in any year, unless he shall have occupied such premises as aforesaid for twelve calendar months next previous to the last day of July in such *year, nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, *shall have been rated* in respect of such premises to all rates for the relief of the poor in such parish or township made during the time of such his occupation so required as aforesaid, nor unless such person shall have paid, on or before the 20th day of July in such year, all the poor rates and assessed-taxes which shall have become payable from him in respect of such premises previously to the 6th day of April then next preceding: Provided also, that no such person shall be so registered in any year unless he shall have resided for six calendar months next previous to the last day of July in such year within the city or borough, or within the place sharing in the election for the city or borough, in respect of which city, borough, or place respectively he shall be entitled to vote, or within seven statute miles thereof, or of any part thereof." And the 28th section enacts "that the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city or borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the last day of July in such year, such person having paid on or before the 20th day of July in such year all the poor-rates and assessed taxes which shall previously to the 6th day of April then next preceding have become payable from him in respect of all such premises so occupied by him in succession." There is a plain distinction between the language of these two sections. The effect of them is thus stated in Rogers on Elections, [*31

(a) The respondent did not appear.

9th edit. 75,—"When the premises are situated in a place where there is a rate for the relief of the poor, *he* (the voter) *must have been rated* *32] in respect *of the subject-matter of his qualification to all rates made during the period required for his occupation: 2 W. 4, c. 45, s. 27: or, if he has occupied different premises in succession, *he must have paid all the rates* for the premises which he has successively occupied: s. 28." To this the author adds the following note,—"In case of a man occupying the *same* premises during the twelvemonth, the 27th section enacts, not only that he shall have paid the rates, but that he shall have been rated,' *i. e.* appeared on the rate-book. With regard to premises occupied *in immediate succession*, however, the right to be registered would seem to depend upon the fact of 'such person having *paid*, &c., all the poor-rates, &c., payable, &c.,' s. 28; and there is no provision in that section similar to that contained in the 27th, that such occupier 'shall have been rated.' *Payment alone, therefore, would seem to be sufficient in the latter case.*" Mr. Elliott, however, takes a different view of the matter." "It has been observed," he says,—Elliott on Registration, 2d edit. 207,—"that there is no provision in the 28th section requiring a person to be rated for premises occupied in succession; the party is only required to have paid all the rates and taxes which shall have, previously to the 6th day of April then next preceding, become payable from him in respect of all the premises so occupied in succession. But it is clear that this is only an explanatory provision relative to the premises occupied in succession; and all the provisions of the previous section must still be complied with, to entitle a person to be registered. The reasonable construction appears to be, that the voter must have been rated in respect of each set of premises to all rates made during the respective occupations, and must have paid the whole, or such proportions of each rate as he is by law liable to pay." It is *33] submitted that the former is the better opinion, and *more consonant with the language used in the different sections. It is further submitted, that, if necessary, the appellant was sufficiently rated. A blank is left for the name of the occupier: in all other respects, the property is sufficiently rated. The precise point was decided upon the 4 & 5 W. 4, c. 76, s. 66, in The Queen *v.* The Inhabitants of Hulme, 4 Q. B. 538 (E. C. L. R. vol. 45), 2 Gale & D. 682. There a pauper occupied for a year a tenement of more than 10*l.* annual value, and paid the rent and poor-rate for a year. In the rate, the landlord's name was inserted under the head "Name of owner," but, in the column headed "Name of occupier," no name was entered: and it was held that the pauper gained a settlement, as being sufficiently "assessed" to satisfy the statute 4 & 5 W. 4, c. 76, s. 66. Lord Denman there says: "It appears to me that there is no difference between the words 'assessed' and 'charged.' Mr. Martin suggests that the legislature must have had some reason for changing the expression;(*a*) but at any rate they do not say so. It is not provided that the name of the party should be inserted, but only that he should be assessed, and pay the rate, for one year. That points only to the necessity of the assessment continuing for a year, and payment being made by the same party; and this the individual in the present case has done." And Patteson, J., says: "The only question is, whether we can put a construction on the words of the

(*a*) The word used in the 3 & 4 W. & M. c. 11, s. 6, was "charged."

statute 4 & 5 W. 4, c. 76, s. 66, different from that which has been put on those of the 3 & 4 W. & M. c. 11, s. 6: and I think we cannot. And, whether it ought to be lamented or not, it is certain that the construction here adopted by the sessions has been put on the statute 3 & 4 W. & M. c. 11, s. 6, *in scores of decisions." That case being [*34 cited in Moss, app., The Overseers of St. Michael, Lichfield, resp., 7 M. & G. 72 (E. C. L. R. vol. 49), 8 Scott N. R. 832, 1 Lutw. 184, Maule, J., says: "In such cases the assessment is upon the *property*;" and, Tindal, C. J., adds, "And whoever may be the occupier is charged." And, in giving judgment, Erle, J., says: "The real question is, whether the party was *intended* to be rated. In The Queen *v.* The Inhabitants of Hulme it was intended to rate the occupier, although a blank was left in the column in which his name should have been inserted." At all events, the difficulty is got over by the 75th section of the 6 & 7 Vict. c. 18, which declares and enacts, "that, where any person shall have occupied such premises as in the said recited act (2 W. 4, c. 4, s. 27), are mentioned for twelve calendar months next previous to the last day of July in any year, and such person, being the person liable to be rated for such premises, shall have been bonâ fide called upon to pay in respect of such premises all rates made for the relief of the poor in such parish or township during the time of such his occupation so required as aforesaid, and such person shall have bonâ fide paid on or before the 20th day of July in such year all sums of money which he shall have been called upon to pay as rates in respect of such premises for one year previously to the 6th day of April then next preceding, such person shall be considered as having been rated and paid all rates in respect of such premises within the meaning of the said recited act, and be entitled to be registered in respect of the same in any year, any misnomer or inaccurate or insufficient description in any rate of the person so occupying or of the premises occupied notwithstanding." Those words are large enough to embrace this case.(*a*)

*ERLE, C. J.—I am of opinion that our judgment in this case [*35 ought to be for the appellant. It appears to me that the argument urged by Mr. *Dowdeswell* upon the construction of the 28th section of the Reform Act, which applies to premises occupied in succession, is well founded. Where the qualification is in respect of one set of premises occupied continuously, to entitle the occupier to be registered for such occupation under the 27th section, he must have been rated and he must have paid the rates: but, according to the wording of the 28th section, where the qualification is in respect of premises occupied in succession, it is enough if the party has paid, "on or before the 20th day of July in such year, all the poor-rates and assessed taxes which shall previously to the 6th day of April then next preceding have become payable from him in respect of all such premises so occupied by him in succession." It appears to me that the difference of language in these two sections abundantly justifies the conclusion sought to be drawn from the 28th section. Looking at the length of time for which the rates are made, the time during which they are in course of collection, and to the allowances usually made as between outgoing and incoming tenants upon a change of occupation, it seems to me to have been clearly the intention

(*a*) The omission of the name of the occupier in the rate was held in Moss, app., The Overseers of St. Michael, Lichfield, resp., not to be cured by the 6 & 7 Vict. c. 18, s. 75.

of the legislature, in framing the 28th section, to provide, that, in the case of successive occupation, the *payment* of the rate should be sufficient. Great and unnecessary trouble and inconvenience would result if the law cast upon the occupier in such a case the duty of seeing that his name is put upon a rate made before his occupation commenced, and then in course of collection. It is manifest that the change of language in the two sections was adopted for a purpose such as that suggested, and that, under s. 28, it is not necessary that the name of the occupier
*36] should appear in the *rate in respect of the premises to which he has succeeded, provided he has *paid* the rates in respect of them. Our decision upon the first point disposes of the case, and therefore it is unnecessary to say anything upon the others. But, if it were necessary to consider the second point, I should incline to think that the same construction ought to be put upon "rating" for the purpose of conferring a qualification to vote for members of parliament, as that which has been put upon the word "charged" or "assessed" for the purpose of a settlement under the poor laws. Many cases occurred in the Court of Queen's Bench in my time, where, for the purpose of gaining a settlement, the payment of rates by the occupier, he being the person intended to be charged or assessed, was held sufficient to satisfy the requirements of the law. It was so held in the case referred to, of The Queen *v.* Hulme, 4 Q. B. 538 (E. C. L. R. vol. 45), 2 Gale & D. 682. It is unnecessary, however, to dwell upon this point, inasmuch as our decision upon the other disposes of the whole case. For these reasons, I am of opinion that the conclusion arrived at by the revising barrister was an erroneous one, and that our judgment must be for the appellant.

Williams, J.—I entirely agree with my Lord in the construction which he has put upon the 28th section of the 2 W. 4, c. 45; and I think it unnecessary to say anything upon the other point.

Crowder, J.—I also agree with my Lord and my Brother Williams, in the construction they have put upon the 28th section of the Reform Act, and do not desire to be understood as having formed any opinion upon the other point. Appeal allowed.

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*37] *Borough of ASHBURTON.

THOMAS POPE SMERDON, Appellant; ROBERT TUCKER, Respondent. *Nov.* 16.

Premises consisting of five closes of land, a barn and other buildings, of the annual value of 40*l.*, were let to A., as tenant from year to year, at the yearly rent of 40*l.* Prior to the last day of July, 1859, the landlord assigned his interest in the *barn and other buildings* to a third person, for the express purpose of depriving the tenant of the right of voting,—the premises retained by the landlord not being sufficient of themselves to confer a vote:—Held, that the requisitions of the 27th section of the 2 W. 4, c. 45, in respect of occupation "under the same landlord," had been substantially complied with, and that the severance of the reversion did not affect the tenant's right to be upon the register,—*the taking* from the same landlord of premises of sufficient value being the principal test relied on by the legislature.

At the court held on the 4th of October, 1859, for the revision of the lists of voters for the parish of Ashburton, Robert Tucker duly objected

to the name of Thomas Pope Smerdon being retained on the list of persons entitled to vote in the election of a member of Parliament for the borough of Ashburton.

The facts were as follows:—Thomas Pope Smerdon occupied as tenant from the 31st of July, 1858, to the 31st of July, 1859, five closes of land and a barn and other buildings situate within the borough of Ashburton, of the annual value of 40*l.* The only objection to the vote was, that the premises were not occupied under the same landlord.

On the 31st of July, 1858, John Sparke Amery was owner in fee and landlord of all the premises. The tenancy was a tenancy from year to year under a verbal agreement, at an annual rent of 40*l.* John Sparke Amery is still landlord and owner of the five closes: but, on the 16th of July, 1859, he sold to the objector, Robert Tucker, an interest in the barn and buildings.

By a deed of that date, duly executed, in consideration of 20*l.*, John Sparke Amery conveyed to the objector, Robert Tucker, the barn and all the buildings occupied by the voter, to hold the same during the joint lives of John Sparke Amery, the grantor, and Robert Tucker, the grantee. The following is a copy of the deed:—

*"This indenture made the 16th of July, 1859, between John Sparke Amery, of, &c., of the one part, and Robert Tucker, of, &c., of the other part: Whereas the said John Sparke Amery is seised of the premises hereafter described and released, and he hath contracted and agreed with the said Robert Tucker for the absolute sale to him of the said premises, for the joint lives of both of them, for the sum of 20*l.*: Now this indenture witnesseth, that, in pursuance of the said contract, and in consideration of the sum of 20*l.* to the said John Sparke Amery in hand now paid by the said Robert Tucker, the receipt whereof is hereby acknowledged, he the said John Sparke Amery doth hereby grant, bargain, sell, alien, and release unto the said Robert Tucker, his heirs and assigns, All that barn, together with the yard, curtilage, and all other the buildings adjacent thereto, situate at Byland, near Headborough, in the parish of Ashburton aforesaid, and now in the occupation of Thomas Pope Smerdon, as tenant thereof, and of the said John Sparke Amery, Together with all edifices, buildings, walls, ways, paths, passages, easements, rights, members, privileges, and appurtenances whatsoever to the said barn, yard, curtilage, and buildings belonging or in any wise appertaining, To have and to hold the said barn, curtilage, and buildings, with their appurtenances, unto and to the use of the said Robert Tucker and his assigns during the joint natural lives of the said John Sparke Amery and Robert Tucker: And the said John Sparke Amery doth hereby covenant with the said Robert Tucker and his assigns, that he the said John Sparke Amery now hath in himself good right and full power to grant the aforesaid premises unto the said Robert Tucker and his assigns in manner aforesaid: And it is hereby declared, that, as long as the portion of the said barn, curtilage, and [*38

*buildings now occupied by the said Thomas Pope Smerdon shall be occupied by him, together with other premises the property of [*39 the said John Sparke Amery, at one rent, the proportion of rent to be paid to the said Robert Tucker by the said Thomas Smerdon for the premises hereby granted in his occupation shall be 1*l.* 10*s.* annually. In witness," &c.

The transaction was a bonâ fide sale for adequate value. The consideration was really paid; but no notice of the conveyance was ever given to the voter; and he did not know of it until it was disclosed in court.

On the 23d of September, 1859, Thomas Smerdon paid to the grantor, John Sparke Amery, the rent which had become payable on the 25th of March, 1859, in respect of all the premises. He has not paid any subsequent rent either to the grantor or grantee.

The barn and buildings conveyed to Robert Tucker are not of the annual value of 10*l.* There is no building on the fields retained by John Sparke Amery. The objector admitted that the object of the arrangement was, by severance of the reversion to destroy the vote.

On the part of Thomas Smerdon it was contended, that, inasmuch as there had been no attornment by him, nor any apportionment of rent agreed to by him, nor any other recognition by him of any other landlord, he still continued (notwithstanding the execution of the conveyance) to occupy all the premises under John Sparke Amery, the original landlord; and that even the statute 4 Ann. c. 16, s. 9, which has rendered attornment unnecessary in certain cases, was imperative in this case, inasmuch as no notice of the conveyance had been given to Thomas Smerdon before the 31st day of July, 1859.

The revising barrister was of opinion that the statute 2 W. 4, c. 45, s. 27, required not only an original taking, *but a continued occupation, under the same landlord; and that, after the execution *40] of the conveyance, John Sparke Amery ceased to be landlord of the premises thereby conveyed: and he therefore decided that the voter had not proved his qualification, and expunged his name from the list.

If the Court of Common Pleas should be of opinion that this decision was wrong, the name of Thomas Pope Smerdon was to be restored to the list of persons entitled to vote in respect of property,—for "building and land," occupied within the parish of Ashburton.

Karslake, for the appellant.—The question in this case turns upon the construction of the 27th section of the 2 W. 4, c. 45, which enacts, "that, in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, who shall occupy, within such city or borough, or within any place sharing in the election for such city or borough, as owner or tenant, any house, warehouse, counting-house, shop, or other building, being either separately, or jointly with any land within such city, borough, or place, occupied therewith by him as owner, or *occupied therewith by him as tenant under the same landlord*, of the clear yearly value of not less than 10*l.*, shall, if duly registered according to the provisions hereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough," &c. The object of the act was, to prevent a person from acquiring a vote by joining together several small takings under different landlords, so as to make up the required qualification. Suppose, during the tenancy, the landlord were to devise the reversion to five different persons, so that each would have an interest of less than *10*l.* a year,—could it be said that the tenant's right to vote was *41] gone? Besides, it cannot be said that the assignee here has become landlord at all within the act: this is not a demise under seal,

but a mere tenancy from year to year: the assignee could not sue upon that contract under the statute 32 H. 8, c. 34. [BYLES, J.—That statute only applies to conditions and covenants.] Yes: Standen *v.* Chrismas, 10 Q. B. 135 (E. C. L. R. vol. 59); Bickford *v.* Parson, 5 C. B. 920 (E. C. L. R. vol. 57); Doe d. Agar *v.* Brown, 2 Ellis & B. 331 (E. C. L. R. vol. 75). To enable a party to sue for use and occupation, there must be some contract, express or implied. Thus, in Churchward *v.* Ford, 2 Hurlst. & N. 446,† copyhold lands were devised to the plaintiffs, in trust for F. for life, but the plaintiffs were never admitted to the copyhold. At the time of the death of the testator, the lands were in the possession of the defendant, to whom F., with the assent of one of the plaintiffs, afterwards relet them in her own name. The plaintiffs then gave notice to the defendants to pay the rent to them: and it was held that an action for use and occupation would not lie by the plaintiffs against the defendant, because no contract could be implied between them, there having been an existing contract between the defendant and F., and the occupation having been by the permission of F. Bramwell, B., there says,—"The word 'landlord' does not mean the lord of the soil, but the person between whom and the tenant the relation of landlord and tenant exists." [BYLES, J.—In Co. Litt. 148 a, it is said: "If the lessor granteth part of the reversion to a stranger, the rent shall be apportioned; for, the rent is incident to the reversion."] An apportionment is not binding on the tenant, without the intervention of a jury. In Bliss *v.* Collins, 5 B. & Ald. 876 (E. C. L. R. vol. 7), two messuages were conveyed to such uses as A. should appoint, and, in default of appointment, to A. for life, and, after the determination of that estate in his lifetime, to B. for the life of A., in trust for A. and his assigns; with remainder to A. in fee. A. leased both [*42 these messuages to a tenant at an entire rent of 65*l.* 10*s.* for a term of years, and, during the continuance of that term, contracted to sell the reversion of one of the messuagas to C. In the contract the messuage was described on lease, together with another, and the apportioned rent in respect of it was 40*l.* A. and B. afterwards conveyed the reversion of both houses, and the entire rent of 65*l.* 10*s.*, unto D., to certain uses, viz., as to the said messuage which A. had contracted to sell, and for recovering the rent of 65*l.* 10*s.*, to such uses as A. should appoint; and, as to the other messuage, and the residue of the entire rent, to the use of A. in fee. A. afterwards appointed the messuage which he had contracted to sell, and the apportioned rent, to the vendee: and it was held that the latter did not require the same rights and remedies against the lessee as he would have acquired if the rent had been legally apportioned by a jury,—the lessee for the term not being bound by an apportionment made without his consent. And see Roberts *v.* Snell, 1 M. & G. 577 (E. C. L. R. vol. 39). The statute 4 Ann. c. 16, s. 9, which renders attornment unnecessary, provides against the tenant being prejudiced by the want of notice of the grant.

Coleridge, for the respondent.—The question arises upon the provision in the 27th section of the Reform Act, which requires that the occupation which is to confer the right of voting shall be *under the same landlord*,—"Provided always, that no such person shall be so registered in any year, *unless he shall have occupied such premises as aforesaid* for

twelve calendar months next previous to the last day of July in such
*43] year." *Any change in the tenancy during the year puts the voter in the same position as if he had originally taken the premises in the same manner as he holds at the time of registration. The real question, therefore, is whether an original taking such as is here described as the holding at the time of registration would have sufficed. [BYLES, J.—What do you say to a holding under three tenants in common?] In that case there would be three landlords. [BYLES, J.—It would be one right. Take the case of a holding under two trustees or executors.] Where the landlords hold as joint tenants, it would do; but not where they are tenants in common. The words of the act point at identity of landlord and of occupation. Here, the voter cannot be said to have held during the whole year under the same landlord. [BYLES, J.—If the landlord dies during the year, and the land descends to his heir-at-law, you would say the vote is gone?] Certainly. [CROWDER, J.—The voter's title, if that be the proper construction of the statute, is a very precarious one. WILLIAMS, J.—The legislature never could have contemplated or foreseen such a consequence.] If the plain letter of the statute be departed from, where is it to stop? If the present holding is good for this year, why may it not be good for ten or twenty years to come? The point is, in effect, decided in two cases which have already been before the court, viz. Capel, app., The Overseers of Aston, resp., 8 C. B. 1 (E. C. L. R. vol. 65), 2 Lutw. Reg. Cas. 143, and Burton, app., The Overseers of Aston, resp., 8 C. B. 7, 2 Lutw. Reg. Cas. 143. There, it was sought to combine property of which the voter was *owner* with property which he occupied as *tenant;* but the court held that that could not be done. Maule, J., says (2 Lutw. Reg. Cas. 154), "The words 'therewith,' and 'under the same landlord,' require an identity of the person under whom he holds as
*44] tenant." Mr. *Rogers, adverting to this,—Rogers on Elections, 9th edit. p. 63,—says: "This restriction may enable a landlord to deprive a tenant holding two tenements of him of his vote; for, if he chose in the course of the year to dispose of one of the tenements held by the voter, the latter would not then 'occupy as tenant under the same landlord.'"

Karslake, in reply.—The dictum attributed to Maule, J., in the report of Capel, app., The Overseers of Aston, resp., in Lutwyche, is not found in the contemporaneous reports: and it was not the point decided. The real question was whether an occupation qualification insufficient in itself could be eked out by joining with it a freehold occupied by the party, which was sufficient to confer a vote for the county. In Collins, app., Thomas, resp., 12 C. B. 639 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 219,—where it was held, that a party who occupies a house and a garden immediately adjoining the house, but both occupied by him as tenant under the same landlord, and at one entire rent exceeding 10*l.* per annum, is entitled to be registered,—Maule, J., in the course of the argument, observes, "You assume that it [occupied therewith] means 'under the same demise.' That, however, is not so in terms. Suppose a man hires a house on one day, and next day a garden contiguous thereto, both from the same landlord, and together worth 10*l.* a year, though separately of less value, would he not be qualified?" A holding under several joint tenants clearly would be a holding under the same

landlord. So, where several tenants in common join in a lease, they must be considered as one and the same landlord. The fair construction of the statute is, that, so long as the holding continues, it continues to be a holding under the same landlord,—under the original take.

*There were two other cases in which similar questions were raised,—John French, app., Robert Tucker, resp., and Amos Bickley, app., Robert Tucker, resp. [*45

In the former, the appellant occupied as tenant from the 31st of July, 1858, to the 31st of July, 1859, a building and land situate within the borough of Ashburton, of the annual value of 11*l.*; William Tucker, a son of the objector, being on the 31st of July, 1858, the landlord of all the premises. The tenancy was a tenancy from year to year, under a verbal agreement, at the annual rent of 11*l.* The estate of William Tucker was an estate for a long term of years, and he still retained that estate in part of premises: but, on the 12th of July, 1859, he sold to his father, the objector, Robert Tucker, an interest in part of the premises. By a deed of that date, duly executed, William Tucker, in consideration of 1*l.* (which was really paid), demised to the objector, Robert Tucker, one of the fields occupied by the voter, to hold during the joint lives of the said William Tucker and Robert Tucker, subject to the payment of a rent-charge of 4*l.* issuing out of all the premises occupied by the voter. No notice of the sale or conveyance was ever given to the voter. No rent had been paid since the execution of the conveyance either to William Tucker or Robert Tucker. The premises retained by William Tucker, and the premises demised by him to Robert Tucker, were not when separated of sufficient value to confer a vote.

In the latter case, the appellant occupied as tenant from the 31st of July, 1858, to the 31st of July, 1859, *a house with a garden attached thereto*, and *an orchard separated from the house and garden*. The premises were all situated within the borough of Ashburton, and were together of the annual value of 14*l.* On the 31st of July, 1858, the objector, Robert Tucker, was *the landlord of all the premises. The tenancy was a tenancy from year to year, expiring at Christmas, under a verbal agreement, at the annual rent of 14*l.* The estate of Robert Tucker was an estate for his own life, and he still retained that estate in the *house* and in the *orchard;* but, on the 23d of June, 1859, he sold to his son and partner, Robert Coard Tucker, an interest in the *garden* only, for 20*l.*, which sum was duly paid. By a deed of that date, duly executed, the objector, Robert Tucker, conveyed to his son, Robert Coard Tucker, *the garden*, to hold to him during the joint lives of the grantor, Robert Tucker, and the grantee, Robert Coard Tucker. No notice of the sale or conveyance was ever given to the voter. The rent had been paid to Robert Tucker up to Christmas, 1858, but none had been paid since. On the 22d of June, 1859, the day preceding the execution of the conveyance, Robert Tucker had given the voter notice to quit all the premises at Christmas, 1859. The house and orchard, without the garden, were not of the annual value of 10*l.* [*46

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court:—

In this case the question was whether the voter was qualified under the 27th section of the Reform Act, 2 W. 4, c. 45, by the occupation of a house with land under the same landlord.

The premises were demised to him by the same landlord, so that his qualification was inchoate. But, in the course of the year of occupation, the landlord sold the reversion in a part of the premises to a third person, so that in one sense the reversion was not in the same landlord during the whole year: and, because the occupation was in this sense
*47] not under the same *landlord during the whole year, it was contended that the qualification was destroyed. But we are of a contrary opinion, thinking that the requisitions of the statute have been substantially fulfilled.

It seems to us that *the taking* from the same landlord of premises of sufficient value is the principal test relied on by the legislature. If the voter so takes the premises, as long as he continues to hold under that take, he holds upon the same terms, and the reversion, whether severed or not, is, as to his interest, the same reversion.

The statute does not express that a change of landlord during the year would destroy the qualification: and we do not gather from the context that the legislature had any such intention.

If an assignment of a part of the reversion would disqualify, it is obvious that the power might be used to prevent the free exercise of the right of voting, and to defeat in many cases the intention of the tenant in taking the premises.

The appeal is therefore allowed, and the decision of the revising barrister reversed. Decision reversed.

*48] *County of DURHAM—Northern Division.

WILLIAM PROCTOR, the Younger, Appellant; RALPH ANNISON, Respondent. *Nov.* 24.

The owner of a copyhold house in a borough divided it into several tenements, so as, if of sufficient value, to give to each occupier a right to vote for the borough under the 2 W. 4, c. 45, s. 27:—Held, that he was by force of the 25th section deprived of the right of voting for the county, the whole being of sufficient value to confer on him the right of voting for the borough, if occupied by himself.

At the court for the revision of the list of voters in the election of knights of the shire for the northern division of the county of Durham, holden at Sunderland on the 7th of October, 1859, William Proctor the younger objected to the name of Ralph Annison being retained in the township of Bishopwearmouth list of voters in such election for the said division. Ralph Annison was entered on the list thus:—

Name of occupier.	Place of abode.	Nature of qualification.	Street, &c., where property situate, &c.
Annison, Ralph	13, Sans Street.	Copyhold house, in tenements.	Darcy Street.

Many years ago Ralph Annison became seised at law in his demesne as of fee, at the will of the lord of the manor, according to the custom of the manor, of the copyhold house so described in the lease, and has ever since continued so seised, and been in the actual receipt for his own use of the rents and profits.

The house is of more than the clear yearly value of 10*l.*, over and above all rents and charges payable out of or in respect of the same. It is situate within the borough of Sunderland, which borough was for electoral purposes created by the Reform Act, 2 W. 4, c. 45. It is two stories or floors high, has only one entrance from the street, and a door at that entrance, with a bolt but no lock on it. The entrance-passage and staircase and landing at the top of the staircase are the same as in ordinary dwelling-houses. All the doors of *the rooms of the house have locks. Neither floor is, together with the staircase and [*49 entrance-passage, of the yearly value of so much as 10*l.* Each floor has been always let separately and as a distinct tenement by Ralph Annison, at a yearly rent of less than 10*l.*, to a separate tenant from year to year, the tenant of the upper floor having the staircase and the use, in common with the other tenant, of the entrance-passage. Except as to the common use of the entrance-passage, each tenant has always, and throughout the six calendar months ending on the last day of last July, had the exclusive use and occupation of the tenement so let to him. The entrance-door has very rarely been bolted or fastened. The doors of the rooms have been locked by night; and, but for such locking, there would have been free access from the street into the rooms. The whole house might conveniently be the residence of one family.

The objection was, that, upon the facts above stated, Ralph Annison was by the 25th section of the Reform Act, 2 W. 4, c. 45, not entitled to have his name retained on the list.

The revising barrister decided that that section did not affect his right, and that the name should be retained on the last.

The like decision was come to in the cases of fifty-two other persons similarly circumstanced. These were all consolidated with the principal case: and, if the court was of opinion that the decision of the revising barrister was wrong, the whole were to be erased from the list.

Manisty, Q. C., for the appellant.—The claimant is the owner of a copyhold house of such value as would confer upon him a vote for the borough. And the question is whether the circumstance of his having let *the house to separate tenants in such a manner as would have [*50 given them a qualification for the borough for separate tenements, if they had been of sufficient value, makes the single house equivalent to separate houses whilst thus occupied, so as to confer upon the owner the right of voting for the county. This depends upon the construction of the 25th section of the Reform Act, 2 W. 4, c. 45, which enacts, "that, notwithstanding anything hereinbefore contained, no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament in respect of his estate or interest as a copyholder or customary tenant, or tenant in ancient demesne, holding by copy of court-roll, or as such lessee or assignee, or as such tenant and occupier as aforesaid (s. 20), in any house, warehouse, counting-house, shop, or other building, or in any land occupied together with a house, warehouse, counting-house, shop, or other building, such house, warehouse, counting-house, shop, or other building being, either separately, or jointly with the land so occupied therewith, of such value as would according to the provisions hereinafter contained (s. 27) confer on him or on any other person the right of voting for any city or borough, whether he or any other person shall or shall not have actually acquired

the right to vote for such city or borough in respect thereof." The 27th section confers a right of voting for the borough upon the occupier of copyhold premises of the yearly value of 10*l.*: and the question is, whether the owner of a copyhold in a borough of the value of 10*l.* a year can acquire to himself a vote for the county because he chooses to let the premises to several tenants, neither of whom pays a sufficient amount of rent to entitle him to a vote for the borough. There is no foundation for the claim. If the claimant had occupied the premises himself, he *would have had a right to vote for the borough: but, *51] though, by the mode of dealing with the property, the borough vote is gone, he clearly has no right to vote for the county.

Davison, for the respondent.—The 27th section of the Reform Act confers a right of voting for the borough upon every person occupying therein "as owner or tenant, any house, warehouse, counting-house, shop, or other building," of the clear yearly value of not less than 10*l.* Under that section it has been held that a "part of a house" is a "house or building,"—see Wright, app., The Town-clerk of Stockport, resp., 7 Scott N. R. 561, 5 M. & G. 33 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 32; Score, app., Huggett, resp., 8 Scott N. R. 919, 7 M. & G. 95 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 198; Daniel, app., Coulsting, resp., 8 Scott N. R. 949, 7 M. & G. 122 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 230; Toms, app., Luckett, resp., 5 C. B. 23 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 19; Downing, app., Luckett, resp., 5 C. B. 40, 2 Lutw. Reg. Cas. 33. The same construction must be put upon the same words in the 25th section. Taking, therefore, the several parts into which these premises had been divided as separate tenements, each of which would, if of sufficient value, confer upon the occupier the right of voting for the borough, inasmuch as neither is of sufficient value to confer such vote for the borough, there is nothing in the 25th section to disentitle the owner to a vote for the county. This point is virtually decided by the case of Webb, app., The Overseers of Aston, resp., 7 Scott N. R. 545, 5 M. & G. 14 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 18. There, the lessee of several houses locally situate within a borough, for the unexpired residue of a term originally created for a period of not less than sixty years, of the clear yearly value of not less than 10*l.*, is entitled to a vote for the county, notwithstanding one of the houses is of *sufficient value to confer a vote for the borough, *52] if the rest are individually of less but collectively of a greater yearly value than 10*l.* clear. And Tindal, C. J., said: "So far as the words of the 20th section go, the claimant has a clear right to vote. Then comes the 25th section; and the question which arises upon that is, whether an intention is expressed with equal clearness of taking away his right; if not, we are bound to say that the right still remains in the party. The 25th section disqualifies a person from voting for the county in respect of his estate or interest as lessee in any house of such value as would confer on him, or any other person, the right of voting for the county." A man may have a vote under s. 20 for any number of copyholds, the whole amounting in value to 10*l.* a year. Does the 25th section take away that right? In a note to that section in Chitty's Statutes (edit. Welsby & Beavan), Vol. 3, p. 346, referring to Webb, app., The Overseers of Aston, resp., it is said: "The difference of expression in these two clauses [ss. 24 and 25], on the one hand as

respects *freeholds*, and on the other as respects *copyholds* and *leaseholds*, is to be observed. In the former case, the owner of property situate within a city or borough, occupied by himself, is prevented from acquiring a right of voting for the county in respect thereof as a freeholder, if the property be of such a description and value, and occupied in such a manner, that it might be made use of by *him* for the purpose of acquiring a vote for the city or borough; in the latter case, the party is excluded from the county franchise, if the property be of such a description and value, and so occupied, that it might be made use of for the purpose of acquiring a vote for the city or borough, either by the claimant himself *or any other person*." Here, the voter does not claim in respect of "house," but of "copyhold house, in tenements:" if that is an *inaccurate description, it may be amended,—Howitt, app., Stephens, resp., 5 C. B. (N. S.) 1 (E. C. L. R. vol. 94), 1 K. & G. 183. [*53

Manisty, in reply.—It is sought upon the other side to construe the 25th section of the Reform Act as if the words "and so occupied" were introduced into it. The 24th section, which relates to freeholds, mentions occupations; but the 25th section turns upon *value* only, whether the premises are occupied or not, and whether the owner or any other person may or may not have acquired the right to vote for the borough in respect thereof. [WILLIAMS, J.—In Webb, app., The Overseers of Aston, resp., 5 M. & G. 32 (E. C. L. R. vol. 44), Maule, J., says: "The question amounts to this. Is the party registered as a voter for the county, as having a right to vote in respect of his estate or interest in any house that would confer a vote for any borough? And I think it is clear from the facts that he is *not* so registered." If this is to be looked at as a single house, your argument is unanswerable: but, if it is to be taken as several tenements, I do not see how you can get over the case of Webb, app., The Overseers of Aston, resp.] It is submitted, that, under this section, value is the test, not occupation. The owner does not acquire the right to vote because no one else has acquired the right of voting in respect of the premises.(*a*) They might be let to a female, who has no vote. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

In this case the claimant is the owner of a copyhold house of such value as would confer on him the right *of voting for the borough. He appears, therefore, to be disqualified, according to the express words of the 25th section of the Reform Act, 2 W. 4, c. 45. But he has contended that the letting of the house to separate tenants in such a manner as would give to them a qualification for the borough for separate tenements if they were of sufficient value, makes the single house equivalent to separate houses during the time it is so occupied. And it is true, that, if the two tenements, instead of being in the vertical line under the same roof, had been in the horizontal line under separate roofs, the separate value of each being insufficient for the borough, but the aggregate value of both being sufficient for the county, he would have been qualified for the county: Webb, app., Aston-juxta-Birmingham, resp., 5 M. & G. 14 (E. C. L. R. vol. 44), 7 Scott N. R. 545, 1 Lutw. Reg. Cas. 18. But, in the case supposed, they would [*54

(*a*) See Dewhurst, app., Fielden, resp., 8 Scott N. R. 1013, 7 M. & G. 182 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 274.

be separate houses: here, it is found to be one house, and, being so, it gives no qualification for the county. And the clause at the end of the section expressly provides that it is immaterial whether the owner or any other person shall have acquired a right to vote for the borough in respect of the house or not.

Our judgment, therefore, is for the appellant, and the decision of the revising barrister is reversed in this case and in the other appeals consolidated herewith. Decision reversed.

END OF THE REGISTRATION CASES.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

AND

IN THE EXCHEQUER CHAMBER,

IN

Michaelmas Term,

XXIII. VICTORIA. 1859.

The Judges who usually sat in Banc in this Term, were:

ERLE, C. J. — CROWDER, J.

WILLIAMS, J. — BYLES, J.

COX *v.* MITCHELL. *Nov.* 2.

It is no ground for staying proceedings in an action here, that proceedings are pending between the parties for the same cause of action in the United States.

THE plaintiff, a merchant at Liverpool, having commenced an action in one of the superior courts of the United States against the defendant, a merchant in South Carolina, for an alleged breach of a contract for the purchase of a quantity of cotton, the proceedings in which were still pending, commenced another action against the defendant for the same cause in this court, and, having procured an order for a capias under the 1 & 2 Vict. c. 110, s. 3, held him to bail.

**Mellish* now moved for a rule calling upon the plaintiff to show [*56 cause why the proceedings in this action should not be stayed, and the bail discharged, and an exoneretur entered on the bail-piece. The matter was before Blackburn, J., on summons, at Chambers; but that learned judge referred it to the court. He submitted that it would be great injustice to the defendant to allow the proceedings to go on in both jurisdictions simultaneously. [ERLE, C. J.—We might be doing

great injustice to the plaintiff by suspending his proceedings here. Have you any authority for this?] There is no reported case: but there was a case a short time since before Coleridge, J., at Chambers, where that learned judge made an order for staying proceedings in an action here, upon its being made appear to him that an action for the same cause was pending in the Consular court at Constantinople,—the money being left in court.(*a*) This application must found itself upon the general jurisdiction of the court to prevent an abuse of its process. If the plaintiff obtains final judgment in the United States court, the authorities show that that might be pleaded in bar here.(*b*) In cases of consolidation rules, the court is in the habit of imposing terms, to prevent injustice being done. Upon the same principle, the court may in its discretion restrain the plaintiff from proceeding in the action here unless he elects to abstain from going on in the foreign court. It may be that he might succeed in the one action and fail in the other.

ERLE, C. J.—I am of opinion that there ought to be no rule in this
*57] case. No authority has been cited to *support it. Although there may be some hardship in having proceedings pending in the two countries at the same time, I think we are bound so to enforce the law as to enable the plaintiff to obtain satisfaction of his debt. There would be great danger in interfering to prevent a man from being sued in this country, when he may have left his own for the very purpose of avoiding the consequences of a suit against him there.

WILLIAMS, J.—I am of the same opinion. The question is whether the fact of the plaintiff having another action pending against the defendant in a foreign court is a bar of his remedy in the courts of this country. I am not aware of any principle upon which such an argument could rest; and, in the absence of any authority, we cannot interfere.

CROWDER, J.—I also am of opinion that this is a motion which cannot be entertained. I see no reason whatever to justify such a course; and I can conceive very many good reasons the other way.

BYLES, J.—Upon the ground of the total absence of authority for such an application as this, I concur with the rest of the court in the refusal of the rule. There must have been many cases where proceedings have been taken here and abroad at the same time, and yet I never heard of such a motion as this: nor has any been produced before us, save the somewhat shadowy case before my Brother Coleridge at Chambers. Rule refused.

(*a*) Probably the case of Barber v. Lamb, which came before this court on demurrer in Easter Term, 1860. Vide post, 8 C. B. N. S.

(*b*) See the case referred to in note (*a*).

*MOTTERAM, Appellant; THE EASTERN COUNTIES RAIL- [*58 WAY COMPANY, Respondents. *Nov.* 22.

Upon the argument of a case stated by justices under the 20 & 21 Vict. c. 43, no objection can be relied upon which was not taken before the justices.

By-laws duly made by a railway company, pursuant to the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 108–111, and confirmed and allowed as by law required, are "public documents," a certified copy of which is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14.

By the 109th section of the 8 & 9 Vict. c. 20, the company is empowered to make by-laws to enforce the observance of its regulations by means of fines; and the 110th section requires that the substance of such by-laws, when confirmed and allowed, "shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of *every wharf or station belonging to the company*, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed, &c.; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." And s. 111 enacts, that, "for proof of the publication of any such by-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such by-laws, was affixed and continued in manner by this act directed," &c.

A by-law imposed a penalty not exceeding 40*s.* upon a passenger getting into or out of a carriage whilst in motion. Upon a summons before justices for a breach of this by-law:—Held, —dissentiente Williams, J.,—that it was sufficient to show that the by-laws were affixed at the stations at which the party entered and quitted the train, without showing publication at every station on the line.

THIS was an appeal against a conviction of Peter Clark Motteram by three justices of the peace for the county of Middlesex, for an alleged offence against the by-laws of the Eastern Counties Railway Company. The following case was stated for the opinion of the court pursuant to the statute 20 & 21 Vict. c. 43:—

The appellant, Peter Clark Motteram, was summoned before the justices upon an information and complaint laid by William Kent, superintendent of police of the Eastern Counties Railway Company, which charged that the appellant, on the 22d of January, 1859, at the parish of Tottenham, in the said county of Middlesex, being a passenger on the Eastern Counties Railway, unlawfully did quit a carriage on the said Eastern Counties Railway while the train of which the said carriage formed part was in motion.

The offence charged is an offence against one of the by-laws of the Eastern Counties Railway Company, made in pursuance of the power given by the statute 8 & 9 Vict. c. 20. The following is a certified copy of such by-laws, so far as is material to this case:—

*"*The By-laws of the Eastern Counties Railway Company.* [*59

"NOTICE IS HEREBY GIVEN,

that the Eastern Counties Railway Company, acting under the powers and provisions contained in the several acts of parliament relating to their railways, have made the following

BY-LAWS.

for regulating the travelling upon and the use of their railways by travellers and passengers; which by-laws have been duly allowed and confirmed as by law is required.

"8th. No passenger will be allowed to get into or upon any carriage after, or to quit any carriage when, the train of which it forms part has been put or is in motion; and every person doing so, or attempting to do so, is hereby subjected and made liable to a penalty not exceeding 40*s.*

"Given under the common seal of the Eastern Counties Railway Company the 5th day of April, 1850.

(Signed) "J. B. Owen, secretary.

"Allowed by the commissioners of railways the 15th day of April, 1850.

(Signed) "Granville.

"Edward Ryan."

At the hearing of the said complaint, a copy of the company's by-laws was produced: and it was proved by the informant that such copy had been examined by him with the original by-laws in the custody of the secretary of the Eastern Counties Railway Company, and that such copy was a true and correct copy of the original.

To the copy of the by-laws produced was attached the following certificate,—"I hereby certify that this is a true copy of the by-laws of this company. J. B. Owen, secretary. 25th May, 1858."

*60] *It was proved that the signature "J. B. Owen" was in the handwriting of the secretary of the said company, and that he had the possession of the original by-laws as such secretary. It was also proved that the appellant was a passenger on the respondents' railway, from Bishopsgate to Tottenham, and that copies of the said by-laws of the said company were hung up and fixed on a conspicuous part of those stations respectively.

It was objected, on behalf of the appellant, that the original by-laws of the said company ought to be produced, and that the examined and certified copy thereof produced was not evidence. The justices declined to require the complainant to produce the original by-laws of the said company, and admitted the examined and certified copy thereof in evidence.

It was also objected on the part of the appellant, that it was necessary for the complainants to prove that copies of the by-laws were affixed to *every* station on the Eastern Counties Railway line between the London and Yarmouth termini. This objection the justices also overruled: and, as the evidence substantiated the offence charged in the information, they convicted the appellant of the said offence, and adjudged him to pay a penalty of 5*s*. and costs.

The questions for the opinion of the court were,—first, whether the examined and certified copy of the by-laws was rightly received in evidence,—secondly, whether it was necessary to prove that copies of the said by-laws were hung up and affixed at every station on the railway of the said company, or whether it was sufficient to prove (as was proved) the publication thereof at the respective stations at which the appellant entered and got out of the train.

If the court should be of opinion that the examined and certified
*61] copy of the by-laws was rightly received *in evidence, and that it was unnecessary to prove the publication thereof at any other stations than those at which the appellant entered and got out of the train, then the said conviction was to be confirmed. But, if the court should be of opinion that it was necessary to produce the original by-laws of the said company, or that it was necessary to prove the publication thereof at every station on the whole length of the railway, then
*62] the conviction was to be quashed.

Norman, for the appellant.(*a*)—The question in this *case arises

(*a*) The points marked for argument on the part of the appellant, were,—

upon the construction of the 108th and some subsequent sections of the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20, empowering railway companies to make by-laws for the regulation of the use of their railways. The 108th section enacts that "it shall be lawful for the company, from time to time, subject to the provisions and restrictions in this and the special act contained, to make regulations for the following purposes, that is to say,—For regulating the mode by which and the speed at which carriages using the railway are to be moved or propelled,—For regulating the times of the arrival and departure of any such carriages,—For regulating the loading or unloading of such carriages, and the weights which they are respectively to carry,—For regulating the receipt and delivery of goods and other things which are to be conveyed upon such carriages,—For preventing the smoking of tobacco, and the commission of any other nuisance, in or upon such carriages, or in any of the stations or premises occupied by the company: And, generally, for regulating the travelling upon or using and working of the railway: But no such regulation shall authorize the closing of the railway or prevent the passage of engines or carriages on the railway at reasonable times, except at any time when in consequence of any of the works being out of repair, or from any other sufficient cause, it shall be necessary to close the railway or any part thereof." The 109th section enacts, that, "for better enforcing the observance of all or any of such regulations, it shall be lawful for the company, subject to the provisions of the 3 & 4 Vict. c. 97, 'An act for regulating railways,' to make by-laws, and from time to time to repeal or alter such by-laws, and make others, provided that such by-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or *the [*63
special act; and such by-laws shall be reduced into writing, and shall have affixed thereto the common seal of the company; and any person offending against any such by-law shall forfeit for every such offence any sum not exceeding 5*l.*, to be imposed by the company in such by-laws as a penalty for any such offence; and, if the infraction or non-observance of any such by-law or other such regulation as aforesaid be attended with danger or annoyance to the public, or hindrance to the company in the lawful use of the railway, it shall be lawful for the company summarily to interfere to obviate or remove such danger, or annoyance, or hindrance, and that without prejudice to any penalty

"1. That the information did not charge any legal offence; the quitting a railway carriage while the train is in motion not being contrary to the statute or common law of the realm: 2. That the information ought to have set forth the by-laws, and to have alleged a violation thereof: 3. That the existence of the by-laws was not sufficiently proved: 4. That the original by-laws of the company, bearing their common seal, ought to have been produced and put in, or their absence to have been duly accounted for: 5. That the copy of the by-laws, certified by the company's secretary, was not admissible in evidence: 6. That the confirmation or allowance of the by-laws was not sufficiently proved (9 & 10 Vict. c. 20, ss. 109, 110; 9 & 10 Vict. c. 105; 3 & 4 Vict. c. 97, ss. 7 to 9): 7. That the copy allowed by the commissioners of railways, and bearing their seal, ought to have been put in (9 & 10 Vict. c. 105, s. 4): 8. That the copy of the commissioners' certificate, certified by the respondents' secretary, was not admissible in evidence: 9. That the publication of the by-laws was not sufficiently proved (8 & 9 Vict. c. 20, ss. 110, 111, 143): 10. That it ought to have been proved that the by-laws had been published and affixed at every station belonging to the company: 11. That, at all events, it ought to have been proved that they had been published and affixed at all the company's passenger stations intermediate between Bishopsgate and Tottenham stations: 12. That it ought also to have been proved that the by-laws were kept and continued published and affixed in like manner."

incurred by the infraction of any such by-law." The 110th section enacts that "the substance of such last-mentioned by-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein, or affected thereby; and such boards shall from time to time be renewed as often as the by-laws thereon or any part thereof shall be obliterated or destroyed; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." And the 111th section enacts that "such by-laws, when so confirmed, published, and affixed, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same; and, for proof of the publication of any such by-laws, it shall
*64] be sufficient to prove that a printed paper or painted board, *containing a copy of such by-laws, was affixed and continued in manner by this act directed, and, in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be."

The power to impose penalties by means of by-laws being against common right, must be construed most strictly. By-laws of this sort were by the 3 & 4 Vict. c. 97, s. 8, to be approved by the board of trade, whose authority in these matters was by the 9 & 10 Vict. c. 105, s. 2, transferred to the commissioners of railways, and by the 14 & 15 Vict. c. 64, s. 1, re-transferred to the board of trade. There is no statement here that the by-laws in question had been so allowed. [*Keane*, for the respondents, objected that this point was not open to the appellant, inasmuch as it was not made before the magistrates. So held by the Court of Queen's Bench in Purkis, app., Huxtable, resp, 28 Law J., M. C. 221.] Then, there was no sufficient proof of publication. To constitute a due compliance with the 110th section of the 8 & 9 Vict. c. 20, the company were bound to prove that the substance of the by-laws was painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of *every wharf or station belonging to the company*. The only proof here was, that copies of the by-laws were hung up and affixed on a conspicuous part of the stations at which the appellant got in and out of the carriage. As a general rule, no law is of any force until it has been duly promulgated. In 1 Bl. Com. 45, it is said: "A bare resolution confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But
65] the manner in which this notification is to be made is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified vivâ voce, by officers appointed for that purpose, as is done with regard to proclamations and such acts of parliament as are appointed to be publicly read in churches and other assemblies. It may, lastly, be notified by writing,

printing, or the like, which is the general course taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Capius) wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people." Here, a particular mode of publication is pointed out, and that must be observed strictly, otherwise the law with a breach of which the party is charged is not brought home to him. In Taylor on Evidence, Vol. 2, § 1470, it is said: "With respect to such by-laws as any railway company is empowered to make for regulating the travelling upon or using and making the railway, or for imposing penalties upon persons other than its servants, it would seem, that, before they can be enforced, the company must produce a copy purporting to be under its seal, and must show that a certified copy has been sent to the board of trade,—or, from the 9th of November, 1846, to the 18th of October, 1851, to the commissioners of railways,—and has been allowed, or, at least, not disallowed, by those respective bodies; and, further, that the by-laws have been duly published: but, for the last purpose, it will be sufficient to prove that a printed paper or painted board containing a copy, was affixed and continued on the front or other conspicuous part of *every wharf or station belonging to the company*, *according to the nature of the respective by-laws, and, in case [*66 of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be." Another class of by-laws is provided for by the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, ss. 124, 125, 126, 127, viz., by-laws for the purpose of regulating the conduct of their officers and servants, and of providing for the due management of their affairs; and by the last of these sections it is provided that the production of a written or printed copy purporting to have the seal of the company affixed thereto, "shall be sufficient evidence of such by-laws in all cases of prosecution under the same." [ERLE, C. J.—The company have necessarily a very large number of stations. Was it necessary for them to prove the affixing of the by-laws at every station? Is it not enough to show that they were duly affixed at the station or stations used by the party complained against?] It is submitted that it is not. And there may be very good reason for requiring publication at *all* the stations, because by that means the by-laws become so generally diffused that all persons using the railway may fairly be presumed to be cognisant of them. Then, as to the admissibility of the examined and certified copy,—the point does not arise under the 8 & 9 Vict. c. 113, s. 1; (*a*) *but reliance will, [*67 on the part of the respondents, be placed upon the 14 & 15 Vict.

(*a*) By which it is enacted that, "whenever by any act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or either House of Parliament, or any committee of either House, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

c. 99, s. 14, which enacts, that, "whenever any book or other document is of such a *public nature* as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom, shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract, by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding 4*d.* for every folio of ninety words." That statute was intended to apply to documents of a public nature, the withdrawal of which from the custody of a public officer might occasion public inconvenience, and not to documents of a private nature: Hoe *v.* Nathorp (or Nelthorpe), 1 Lord Raym. 154, 3 Salk. 154; Lynch *v.* Clerke, 3 Salk. 154; note to The King *v.* Lord George Gordon, 2 Dougl. 593; Taylor on Evidence, §§ 1436, 1440; The King *v.* Haines, Comb. 337, Skin. 584; The King *v.* Smith, 1 Stra. 126. In Taylor on Evi-
*68] dence, § 1434, it *is said: "The most satisfactory mode of proving official registers and other public documents of a like nature, is, by producing the books or documents themselves, and showing that they come from the proper repository. In some few cases this is the *only legitimate mode of proof.* Thus, the books of companies subject to the provisions of the Companies Clauses Consolidation Act, in which are entered the proceedings of the directors, of the committees of directors, and of the meetings of the company, and each entry in which must purport to be signed by the chairman of the meeting, cannot be proved by copies, however authentic; neither can the books of the proceedings of companies to which the Joint Stock Companies Act of 1856 (19 & 20 Vict. c. 47) applies, be proved by copies, but the books themselves must be produced, when, if the entry sought to be read purports to be signed by the chairman of the meeting, it will be received as primâ facie evidence: s. 40. So, the orders and other documents which have proceeded from the now abolished commissioners of railways, must, it seems, be proved by the production of the originals purporting to be sealed or stamped with the seal of the commissioners, and to be signed by two or more of that body; and the same law would appear to extend to all documents relating to railways, which now emanate from the board of trade, and which must purport to be signed by one of the secretaries or assistant secretaries of the board, or by some officer appointed by the board to sign such documents." It is clear, therefore, upon the authorities, that no sufficient proof of the by-laws in question has been given.
*69] *David Keane*, contrà.(*a*)—The 14th section of the *14 & 15 Vict. c. 99 makes an examined copy or extract signed and certified

(*a*) The points marked for argument on the part of the respondents were:—
"1. That the original of the by-laws is a document of a public nature, admissible in evidence as such, and an examined copy of it proved to be such, or a copy purporting to be signed and certified as a true copy by the officer to whose custody the original is intrusted, is admissible in evidence: 2. That a publication of the by-laws, which, by the means indicated in the 8 & 9 Vict. c. 20, s. 110, gives public notice of them to the parties interested therein or affected there-

to be a true copy or extract by the officer to whose custody the original is intrusted, admissible in evidence, wherever the document from which the copy or extract was taken would itself have been evidence. Then, as to the publication. It would be a most inconvenient construction of the statute to hold it to require the company, as a condition to the enforcement of their by-laws against an offender, to prove that they were duly affixed, and continued at the time of the committing of the offence affixed, in the front of every one of their eighty stations. [ERLE, C. J.—It may be very inconvenient. It may be that no by-law can be enforced, unless you have the station-master or some other person from every station to prove that the board was duly exhibited at the time of the alleged offence. Still, if the legislature have required it, it must be done. WILLIAMS, J.—The 111th section in very general terms prescribes the mode of publication: it provides that the substance of the by-laws, when confirmed or allowed, shall be painted on boards or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter *of such by-laws respectively, and so as to give notice to the parties interested therein or affected thereby. I see no insuper- [*70 able difficulty in proving the fact. A single witness that has seen the notices up would suffice; and the presumption would be that they continued up, in the absence of evidence to the contrary.] The declared intention of the act was that all parties interested or affected by the by-laws should have notice,—reasonable notice according to the subject-matter. The appellant here was only interested in a publication at the station at which he got in, and at that at which he got out: and that *was* proved. [WILLIAMS, J.—There is no statement in the case that the by-laws were affixed at all the stations which the appellant passed on the journey.] The obvious answer to that is, that the case is equally silent as to there being any intermediate stations. It would have been perfectly competent to the justices upon the evidence before them to have inferred that the company had performed the duty which the act of parliament imposes upon them.

Norman, in reply.—The manner in which the publication of the by-laws is to be proved is expressly provided for by the 111th section, which enacts that "it shall be sufficient to prove that a printed paper or painted board containing a copy of such by-laws, was affixed and continued in manner by this act directed." There can be no difficulty in furnishing such proof: the man who regulates the clocks at the various stations might easily do it. And, even if it were difficult or inconvenient, that is no reason why a plain direction of an act of parliament should not be complied with.

ERLE, C. J.—I am of opinion that the judgment in this case ought to be for the respondents. I think the *examined and certified copy of the by-laws was properly received in evidence, as a docu- [*71 ment of a public nature. Railway companies certainly do affect and regulate the interests of the public to a very large extent and in a great number of ways. The statute contemplates that these by-laws for regu-

by, is sufficient, and is shown by the case to have taken place: 3. That, regard being had to the nature and object of the by-laws and the legislation relating to them, there was sufficient evidence of the statutory publication."

lating the use of and the traffic and travelling upon the railway shall before they shall be of any force receive the confirmation and allowance of the board of trade or the commissioners of railways. They are to have also the sanction of the common seal of the company: and one governing copy is to be kept by the secretary. I therefore think it is a document which falls within the common-law principle applicable to documents of a public nature. It also falls within the 14 & 15 Vict. c. 99, s. 14, which expands the rules of the common law as to the admissibility of public documents. The justices were quite right in admitting the copy in evidence.

Then comes the question whether there was sufficient proof of the publication of these by-laws,—it having been shown that the appellant got into the carriage at the Bishopsgate station and got out at Tottenham, and that a copy of the by-laws had been properly affixed at both of those stations. The appellant objects that the requisitions of the 110th section have not been complied with. That section provides that "no penalty imposed by any such by-law shall be recoverable unless the same (?) shall have been published and kept published *in manner aforesaid.*" The "manner aforesaid" is defined in the earlier part of the section, which enacts that "the substance of such by-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or confirmation of the same, shall be painted
*72] on boards, or printed on paper and pasted on boards, and *hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the by-laws thereon or any part thereof shall be obliterated or destroyed." It was insisted on the part of the appellant that no by-law can be enforced without proof that a copy has been put up and remains affixed to the front or other conspicuous part of every wharf and station belonging to the company. But I am of opinion that the provision regulating the publication of these by-laws must be read with a reasonable application to the subject-matter,—that is, that the by-laws affecting wharfs shall be affixed to wharfs, and those affecting the railway and the stations thereon shall be affixed to the stations: but they need not be affixed at both. I also think the by-laws must be held to be published "so as to give notice to the parties interested therein or affected thereby," if it is shown that they are duly affixed at the station at which the party gets in and at the station at which he gets out. My Brother Williams, for whose opinion I entertain the greatest deference and respect, dissents from this view. I am also of opinion that the respondents are entitled to judgment upon the further ground urged by Mr. *Keane*, that it was the duty of the company to comply with the statute by publishing their by-laws in the manner therein required, and there is a strong presumption that a public body has performed the duty which the law casts upon them; and that, upon proof that the copy of the by-laws had been duly published at the stations of departure and arrival in the par
*73] ticular instance, afforded ample *ground from which the justices would have been warranted in assuming that this duty had in like manner been performed at all the other stations. Upon the whole I

am of opinion that the case of the appellant fails, and that the respondents are entitled to the judgment of the court.

WILLIAMS, J.—I regret much to say that I feel obliged to come to a different conclusion. I think the penalty could not be legally enforced in this case for want of proof that the by-laws in question had been duly published by being affixed and continued affixed at every station on the line of railway, according to the requirements of the 110th section of the 8 & 9 Vict. c. 20. The 108th section of that statute enables the company to make by-laws for regulating the mode by which and the speed at which carriages using the railway are to be propelled,—the times of arrival and departure of such carriages,—the loading or unloading thereof, and the weights they are to carry,—the receipt and delivery of goods and other things which are to be conveyed upon such carriages, —the preventing of smoking and other nuisances in such carriages or in any of the stations or premises occupied by the company,—and generally for regulating the travelling upon or using and working of the railway. That section, therefore, enables the company to make laws which are to regulate the whole line, and by which all persons using the line, or any part of it, are to be bound. In s. 109, the statute proceeds to prescribe how such by-laws are to be made, and what shall be the consequences of any breach of them. The 110th section then declares what shall be done when the by-laws are made. It enacts that "the substance of such last-mentioned by-laws, when confirmed or allowed according to the provisions of any act in force regulating the allowance or *confirmation of the same, shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and [*74 continued on the front or other conspicuous part of every wharf or station belonging to the company, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed as often as the by-laws thereon or any part thereof shall be obliterated or destroyed." I can readily understand that the legislature, having empowered the company to make a code of regulations, should go on to provide, for the purpose of insuring their publication amongst those who were likely to be affected by them, that notice should be given by affixing them at every station upon their line. Having provided that the by-laws shall be stuck up at every station or wharf (according to the subject-matter), the clause then goes on to state how it shall be stuck up,—*so as to give public notice thereof to the parties interested therein or affected thereby:* so that that portion of the public who use the railway either for travelling thereon or transmitting goods thereby may have an opportunity of seeing them. The act having provided that the notice shall be thus given in order to insure general notoriety amongst all who frequent or use the railway, then proceeds with a separate enactment,—"*and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid.*" I am unable to give to the language of that section any other meaning than that it disables the company from enforcing any penalty for a breach of their by-laws unless the direction therein contained as to their publication has been duly complied with.

*75] It is contended on the part of the appellant that this *construction cannot be the true one, because of the great inconvenience which will be entailed upon the company by requiring proof that the by-laws have been affixed at every one of their numerous stations. I must confess I do not see the great difficulty which has been suggested. But, even if such difficulty did exist to the fullest extent, I can give no other meaning to the section without doing an unjustifiable degree of violence to the language the legislature has used. It may be that the framer of the act and those who passed it have failed to perceive the difficulty, if any exists: but they have in plain and unmistakeable language declared that no penalty imposed by any by-law shall be recoverable unless the by-laws shall have been published and kept published in the manner prescribed. The question then is, whether or not that has been proved. I must confess I have great difficulty in applying the maxim "omnia præsumuntur ritè esse acta" to this case, because the 111th section of the act goes on to say that "such by-laws, when so confirmed, published, and affixed, shall be binding upon and be observed by all parties, and shall be sufficient to justify all persons acting under the same; and, for proof of the publication of any such by-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such by-laws, was affixed and continued *in manner by this act directed*, and, in case of its being afterwards displaced or damaged, then that such paper or board was replaced as soon as conveniently might be." It would seem by that section that the legislature, in the case of railway companies, has thought fit to provide, that, in lieu of actual proof of the publication of their by-laws, the course prescribed shall be taken to be sufficient proof of publication. But, to entitle them to avail themselves of that substituted mode of *76] publication, the company must *prove that they have done it. We cannot *presume* that they have complied with the statute. But, even assuming that the maxim referred to could be applicable to such a case as this, it does not appear to have been applied by the justices: on the contrary, it would appear from the statement of the case that they declined to entertain the question. After stating the first objection, and the way it was disposed of, they go on to say,—"It was also objected on the part of the appellant that it was necessary for the complainant to prove that copies of the by-laws were affixed at every station on the Eastern Counties line between the London and Yarmouth termini. This objection we also overruled," &c. They were therefore of opinion that it was not necessary to prove that the by-laws were affixed at all the stations. They thought there was no foundation for the objection, and did not conceive it to be necessary to have recourse to the presumption. Now, if I am right in the construction I put upon the statute, viz., that, by the express terms of the 110th section, no by-law can be enforced unless it has been published as the act requires, I cannot come to any other conclusion than that the conviction ought not to have taken place. The justices ought either to have held that the proof was necessary, or that they were satisfied to presume a due publication from the evidence they had before them.

I regret much to feel myself compelled to differ in opinion from my Lord and my two learned Brothers: and I also very much regret that the construction which I put upon the statute should be supposed to lead

to harsh and inconvenient consequences. But I can see no reason why I should give to the words any other than their ordinary grammatical construction.

Upon the other point, I entirely concur in what has fallen from the Lord Chief Justice.

*CROWDER, J.—I entirely concur in the opinion given by the Lord Chief Justice upon both the questions put to us by the [*77 justices in this case. The first question is, whether the examined and certified copy of the by-laws was rightly received in evidence. Looking at the nature of railway companies, the purposes of their incorporation, and the large and general interests involved, it appears to me that their by-laws, made under the sanction and authority of a public act of parliament, and sealed with the common seal of the company, and deposited with their public officer, must follow the general rule of evidence as to public documents,—which I understand to mean documents of such a nature and character that a large portion of the public are materially interested therein. Upon this ground, therefore, I am of opinion that the copy was properly admitted.

As to the other and more difficult question, I also agree in the construction which my Lord has put upon the several clauses of the Companies Clauses Consolidation Act upon which that question arises. If we were to hold that the 110th section means not only that copies of the by-laws shall be painted or printed and affixed on every one of the company's stations, but that, to enable them to enforce a penalty for the breach of any of them, it must be distinctly and affirmatively proved that they were affixed and that they still continue affixed at each station throughout the line, it seems to me that that would involve such difficulties as would virtually render the by-laws nugatory. My Brother Williams seems to think that there would be no real difficulty, inasmuch as any officer of the company acquainted with the fact might be called to prove it. But it seems to me that it would be requiring a quantity of proof which the legislature never could have contemplated or intended; and, unless the *language used by them is so stringent and precise as to render it impossible to arrive at any other conclusion, I [*78 think we ought not to put such a construction upon it. Two questions arise upon this part of the case,—first, do the words of the 110th section make it imperative that the by-laws shall be affixed at every station?—secondly, assuming that they do so, was there evidence enough before the justices to warrant the presumption that the direction of the statute had been complied with, and to support the conclusion they came to? Now, looking at the language of the 110th section, it seems to me that the words, "so as to give public notice thereof to the parties interested therein or affected thereby," would be utterly nugatory if they did not mean something more than was meant to be conveyed by the previous part of the section. The section begins with saying that "the substance of such last-mentioned by laws, when confirmed, &c., shall be painted on boards or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company." If the section had stopped there, possibly the construction which has been contended for by the appellant, and adopted by my Brother Williams, would have been the true one, viz., that the notice must appear at every

station. But then come the words to which I have adverted, and which I cannot help thinking must have been introduced for the purpose of limiting the scope of the previous general words, and confining them to the real purpose of the legislature, viz., to conveying notice of the by-laws to all those who were interested therein or likely to be affected thereby. I feel the force of the observations of my Brother Williams; and, perhaps, if it had rested upon this alone, I should have desired time to consider. But then there is the other part of the case to which
*79] the Lord Chief *Justice has referred, viz., that the magistrates may have decided as they did upon the ground that they were satisfied from the evidence before them that the by-laws had been duly affixed at every station on the line. It is not very clearly stated in the case upon what precise ground the decision was founded. But it seems to me to be consistent with what is stated, that the magistrates may have considered that the evidence of the affixing of the boards containing the by-laws at the two stations more particularly affecting the party here charged, viz., at the station at which he got in and at that at which he got out, was sufficient to justify them, without distinct proof of the fact, in concluding that the requirements of the statute had been duly complied with by affixing copies at all the other stations. And I do not think that that is going at all beyond the ordinary rule that all things are to be presumed to be rightly done unless there is some proof or some irresistible presumption to the contrary. Upon this ground, therefore, as well as upon the ground that I think the construction which my Lord has put upon the 110th section of the statute is the correct one, I am unable to say that the decision of the justices was erroneous, and concur with the majority of the court in holding that the respondents are entitled to our judgment.

WILLES, J.—I agree with my Lord Chief Justice and my Brother Crowder. Upon the first question,—whether the examined and certified copy of the by-laws was rightly received in evidence,—we are all agreed that it was so. As to the necessity of proving that the by-laws were affixed at every station on the line, however remote, so as to bind this appellant, I agree with what has fallen from my Lord and my Brother Crowder. It appears to me that we are not called upon to put any
*80] forced construction upon the words of *the statute in order to arrive at the only conclusion we could arrive at without imposing serious inconvenience not only upon the company but also upon the persons proceeded against. I should have thought that the direction that the substance of the by-laws "shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of every wharf or station belonging to the company, and so as to give public notice thereof to the parties interested therein or effected thereby," pointed to a mode of publication whereby persons dealing with the company at those particular places should receive notice of what they were to do or avoid. Even if that were not the true grammatical construction of the statute, I apprehend it would nevertheless be necessary so to construe it; because, if the giving a strict grammatical construction to a statute leads to any repugnance or absurdity,—in the sense of being contrary to the mind and intention of the framers of the act,—we are bound so to read the

words as to avoid that result.(*a*) An instance of that is found in s. 111, which provides, that, "for proof of the publication of any such by-laws, it shall be sufficient to prove that *a* printed paper or painted board containing a copy of such by-laws, was affixed and continued in manner by this act directed." Reading that literally, it would only be necessary, in proceeding against a party for a breach of the by-laws, to prove that some one board having the by-laws thereon was hung up or affixed at any one station on the line. It is impossible to reconcile *that section, if construed grammatically, with the 110th section: we are bound, therefore, to read the single printed paper or painted board there as a printed paper or painted board hung up and affixed at every station. A literal construction of the 111th section would lead to this absurdity,—that, in order to enforce a penalty against a man who gets in at the Bishopsgate station and out at Tottenham, it would be sufficient proof of publication to show that a copy of the by-laws was affixed at the station at Yarmouth. So, when you look at the 108th section, which points out the purposes for which the by-laws may be made, you find that a valid by-law may be made which would apply to one station, or one portion of the railway, and not to others. Then, the 109th section imposes a penalty for breach of the by-laws not exceeding 5*l.*; and, taking the extent of the railway, and the great number of stations thereon, it would be repugnant and absurd to hold, that, in order to enforce so trifling a penalty, the almost inconceivably inconvenient quantity of proof of publication suggested should be necessary. All these considerations induce me to think that the proper construction of the 110th section is that which has been put upon it by my Lord and my Brother Crowder, and which supports the decision to which the justices came. The conviction must, therefore, be affirmed, but, under the circumstances, without costs. [*81

Conviction affirmed, without costs.(*b*)

(*a*) A strict grammatical construction certainly cannot be applied to the latter part of s. 110, —"and no *penalty* imposed by any such by-law shall be recoverable, unless *the same* (*i. e.* the *penalty*) shall have been published and kept published in manner aforesaid." See s. 143.

(*b*) And see the 143d section of the 8 & 9 Vict. c. 20, which enacts that "the company shall publish the short particulars of the several offences for which any penalty is imposed by this or the special act, or by any by-law of the company affecting other persons than the shareholders, officers, or servants of the company, and of the amount of every such penalty, and shall cause such particulars to be *painted on a board, or printed on a paper and pasted thereon, and shall cause such board to be hung up or affixed on some conspicuous part of the principal place of business of the company, and, where any such penalties are of local application, shall cause such boards to be affixed in some conspicuous place in the immediate neighbourhood to which such penalties are applicable or have reference; and such particulars shall be renewed as often as the same or any part thereof is obliterated or destroyed; and no such penalty shall be recoverable unless it shall have been published and kept published in the manner hereinbefore required." [*82

INGHAM *v.* PRIMROSE. *June* 28.

A. accepted a bill and gave it to B. (who put his name thereto as drawer) for the purpose of his procuring it to be discounted and handing over the proceeds to him. B. having failed to discount it, returned the bill to A., who tore the bill in half (intending, as the jury found, to cancel it), and threw the two pieces into the street. B. picked them up in A.'s presence, and afterwards pasted the two pieces together, and put the bill in circulation.

The tearing of the bill was done in such a way that the appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post as with its having been torn for the purpose of destroying it:—

Held,—it being reserved for the court to draw inferences of fact,—that A. was liable upon the bill at the suit of a bonâ fide holder without notice.

Whether the act of so reconstructing the bill amounted to forgery,—*quære?*

THIS was an action upon a bill of exchange drawn by one Charles Murgatroyd upon and accepted by the defendant, and endorsed by Murgatroyd to one King, and by King to the plaintiff.

Plea,—that the defendant accepted the said bill of exchange in the declaration mentioned, and delivered the same to the said Charles Murgatroyd, who took the said bill from the defendant for a special purpose only, to wit, that he might get it discounted for the defendant and pay him over the proceeds, which purpose wholly failed, nor was there ever any value or consideration for the defendant's said acceptance of the said bill, or for the payment by him of any part of the amount thereof, and the said bill was never discounted for the defendant; that, after the *83] said bill had *been so accepted by the defendant, and whilst it was held by the said Charles Murgatroyd for the purpose aforesaid, the said bill was with the consent of the defendant and the said Charles Murgatroyd cancelled by the same being torn into two parts *for the purpose of cancelling and destroying the said bill*, and the purpose for which the defendant had accepted and the said Charles Murgatroyd had held the said bill was then revoked and determined; that the said Charles Murgatroyd afterwards, wrongfully, and without the consent of the defendant, joined the said parts of the said bill, and negotiated the same for his own purpose and in fraud of the defendant, who never authorized the same being endorsed or negotiated; and that the said bill was never endorsed to or held by any person who took the same bonâ fide and for value or consideration and without notice of the premises and before the same had become overdue according to its tenor.

Upon this plea the plaintiff joined issue.

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858. The facts which appeared in evidence were as follows:—The defendant accepted the bill declared on, and gave it to Charles Murgatroyd for the purpose of procuring it to be discounted for his use. Murgatroyd tried, but in vain, to get the bill discounted, and returned it to the defendant, who in Murgatroyd's presence tore the paper in half and threw it away in the street. Murgatroyd picked up the bill, observing that it was better not to throw it down in the street; whereupon the defendant said nothing. Murgatroyd afterwards pasted together the two pieces of paper, and passed the bill away to one King, who afterwards endorsed it to the plaintiff.

The jury found that the defendant when he tore the bill in half and *84] threw it away intended to cancel it; *that King bonâ fide gave 15*l.* for the bill; but that the transaction between King and the plaintiff was not bonâ fide.

The learned judge thereupon directed a verdict to be entered for the defendant, but gave the plaintiff leave to move to enter the verdict for him,—the court to be at liberty to draw inferences of fact.

Cross, in Easter Term, 1858, accordingly obtained a rule nisi. He referred to Robins *v.* Viscount Maidstone, 4 Q. B. 811 (E. C. L. R. vol. 45), Dav. & M. 30.

Pearce, in Trinity Term, showed cause.—The finding of the jury, which was well warranted by the evidence, that the bill was torn by the drawer animo cancellandi, and that there was no consideration as between King and the plaintiff, sustains the plea. Further, this instrument altogether ceased to be a bill before it was put in circulation, and therefore the plaintiff could acquire no rights upon it against the acceptor. [WILLIAMS, J.—That depends upon the meaning of the words "cancelling and destroying" in the plea.] It is submitted that any subsequent issue of the bill after an act done by the acceptor intimating an intention to cancel it, would be an act of forgery.

Cross, in support of his rule.—The mere finding of the jury that the acceptor tore the bill in half with the intention of cancelling and destroying it, is not enough to invalidate the bill in the hands of a bonâ fide holder. It was owing to the defendant's own laches that an opportunity was given to Murgatroyd to make an improper use of the bill. The circumstance of the bill appearing to have been divided did not call for the exercise of any extraordinary caution on the part of a subsequent endorsee; for, it is not an *uncommon thing for bills and notes to be cut in half for the more safe transmission of them through the post. [*85

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

This case was argued before the late Lord Chief Justice, my Brothers Willes and Byles, and myself. We are of opinion that the plaintiff is entitled to judgment. It is, we think, settled law, that, if the defendant had drawn a check, and, before he had issued it, he had lost it, or it had been stolen from him, and it had afterwards found its way into the hands of a holder for value without notice, who had sued the defendant upon it, he would have had no answer to the action. So, if he had endorsed in blank a bill payable to his order, and it been lost or stolen before he delivered it to any one as endorsee.(*a*) The reason is, that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country; and, in order that this may not be impeded, it is requisite that innocent holders for value should have a right to enforce payment of them against those who by making them have caused them to be a part of such currency. In the present case, the defendant made the bill in question, and rendered it a negotiable instrument, and then tried in vain to get it discounted. It was then returned to him, and was intended by him to be wholly withdrawn from circulation. But it was, notwithstanding, again put into circulation through the fraud of another man, and reached the hands of the plaintiff, who held it for value, without any notice of the fraud.

If these were all the facts of the case, it appears to *be impossible to distinguish it in any material point from the cases already mentioned, of liability when the original circulation has been effected by fraud, without the consent of him who made the instrument. [*86

(*a*) See the judgment in Marston *v.* Allen, 8 M. & W. 504.†

The question, then, is, whether such liability is precluded by the fact, that, before the instrument was put into circulation for the second time, the defendant had torn it, with the intention of destroying or annulling it.

If an act done with such an intention by the maker of a negotiable instrument does not manifest the intention on the face of the instrument, it can hardly be maintained that the act would be of any efficacy; because the instrument would nevertheless be apparently a part of the mercantile currency; as, for instance, if, in the present case, the defendant had merely crumpled up the bill in his hand and thrown it away, and it had been restored to its original appearance, without leaving any trace of the act which was intended to annul it. But, if, on the other hand, the act be such that the paper bears on the face of it the signs of something having been done to it which is characteristic of an intention to destroy or annul it; as in the case of Scholey *v.* Ramsbottom, 2 Campb. 485, where the drawer of a check tore it into four pieces and threw it from him, and the four pieces were afterwards neatly pasted together upon another slip of paper, but the rents were quite visible, and the face of the check soiled and dirty;—no holder of an instrument in such a condition could enforce it, because, in truth, no man of ordinary intelligence and caution could fairly regard it as part of the apparent commercial currency.

The case before us, therefore, appears to turn on the question whether the act of tearing the bill into two pieces, being manifest on the face of it, is such an act *as primâ facie ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation. As we understand the facts, the tearing had been done in such a way that the appearance of the bill when it reached the plaintiff's hands was at least as consistent with its having been divided into two, for the purpose of safer transmission by the post, as with its having been torn for the purpose of annulling it. It was, properly, a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose. But the point has been so reserved at the trial that the court is to perform the function of the jury in this respect: and we cannot find enough on the facts of the case, or on an inspection of the bill itself, to justify us in coming to such a conclusion.

*87]

But it is argued, on the part of the defendant, that the putting together of the two halves under the circumstances amounted to forgery, just as much as if some signature which he had written for a different purpose had been taken from its proper place, and fraudulently attached as his signature to the bill.

This would be a very narrow ground of decision, inasmuch as it would concede that the bill would be enforceable if the tearing had stopped short of utterly dividing the paper, or if the bill had come to the plaintiff's hands in the halves, by two successive posts, with an intimation that it was so sent to him for the purpose of safer transmission.

However, it seems to us, that, even assuming that the act of thus reconstructing the bill constituted a forgery (which may admit of grave doubt), yet, on the principle of the decision of Young *v.* Grote, 4 Bingh. 253, 12 J. B. Moore 484, this would be no answer to the claim of the

plaintiff, because the defendant, by *abstaining from an effectual cancellation or destruction of the bill, has led to the plaintiff's [*88 becoming the holder of it for value, and without having any just cause for supposing that it had been cancelled or annulled.

The rule must therefore be absolute for entering a verdict for the plaintiff for the amount of the bill and interest.

Rule absolute accordingly.

The cutting or separating of a bank note, even for an innocent purpose, as for safe transmission by mail, destroys its negotiability, and therefore no person can thereafter become a *bonâ fide* holder of one of the parts, though he may have taken it for value in the ordinary course of business. For this reason the original owner of the note at the time of the separation, may recover against the bank at law, on the part retained by him, for the full amount of the note, on accounting for its mutilation, proving the loss or destruction of the other part, and giving indemnity: Patten *v.* State Bank, 2 Nott & McCord 464; Bullet *v.* Bank of Pennsylvania, 2 Wash. C. C. 172; Martin *v.* Bank U. S., 4 Id. 253; U. S. Bank *v.* Sill, 5 Conn. 106; Hinsdale *v.* Bank of Orange, 6 Wend. 378; State Bank *v.* Acrsten, 3 Scamm. 135; Allen *v.* State Bank, 1 Dev. & Batt. Eq. 1; Bank of Virginia *v.* Ward, 6 Munf. 166; Farmers' Bank *v.* Reynolds, 4 Rand. Va. 186; Union Bank *v.* Warren, 4 Sneed 167; Comm. Bank *v.* Benedict, 18 B. Monr. 307. The opposite doctrine as laid down by Lord Ellenborough, in Mayor, &c., *v.* Johnson, 3 Camp. 324, is overruled in this country. Indeed, it has been held that even an express notice by a bank that it will not pay half notes even to the original holder, will not affect his rights: Martin *v.* Bank of the U. S., 4 Wash. C. C. 253; U. S. Bank *v.* Sill, 3 Conn. 106.

In Northern Bank *v.* Farmers' Bank, 18 B. Monroe 506, where pieces of different bank notes had been skilfully joined together, so as to make a new note, but in such a manner as that the note, in the words of the court, "must have presented upon its face, such unmistakeable evidences of fraud and forgery, as amounted to notice, or at any rate, such as ought to have deterred any reasonably prudent person from receiving it in the ordinary course of business," it was held that the holder could not recover against the bank, as, though he may have taken in good faith, he could not be considered as an innocent holder.

In Comm. *v.* Hayward, 10 Mass. 34, it was held not to be an indictable offence to cut a piece out of a bank note, with intent, with the bill thus altered and other pieces of similar bank notes altered and cut, to form other bank notes, with intent to utter the same. But it was observed by the court, that if the defendant had completed his purpose, and by this means in fact manufactured a new note, "perhaps this would have been forgery." This last offence is now expressly made forgery by statute in Massachusetts, Rev. Stat. Ch. 127, § 11, and Pennsylvania; Penal Code 1860, § 166.

The extent to which the holder of a bank note or other note payable to bearer or endorsed in blank, which has got into circulation by fraud or theft, will be affected by want of care or prudence in taking it, a question on which there has been a considerable fluctuation of decision in England and this country, will be found discussed in the note to Miller *v.* Race, 1 Smith's Lead. Cas. 250.

WILLIAM FREDERICK PADWICK, Appellant; WILLIAM KING, Respondent. *Nov.* 18.

One H., the tenant of a farm the right of sporting over which was reserved to the landlord (the tenant also having permission to sport over the farm), authorized one of his labourers to shoot a rabbit for the purpose of giving it to his (the labourer's) wife, who was ill. The justices having decided, upon a complaint under the 1 & 2 W. 4, c. 32, s. 30, for a trespass in pursuit of conies that the labourer was acting by the order of his master,—The court, upon appeal, affirmed their decision.

THE following case was stated for the opinion of the court by the justices of the Havant petty sessions, pursuant to the 20 & 21 Vict. c. 43:—

William King was charged under the 30th section of the 1 & 2 W. 4, c. 32, at the Havant petty sessions held on the 10th of May, 1859, with having on the 30th of April, 1859, at the parish of Hayling South, in the county of Southampton, committed a certain trespass, by entering in the day-time upon certain land there situate, the property of William Padwick, in pursuit of conies, contrary to the form of the statute; to which he pleaded not guilty.

It appeared in evidence, that, at 7 35 p.m., on the 30th of April, William King, the parish clerk of Hayling South, was in a field, the property of William Padwick, in the occupation of Henry John Hawkins, with a gun in his hand; that the gun was pointing towards a bank beyond which was a hedge-row, beyond which was a road, beyond which was a coppice. The hedge-row and coppice were the property and in
*89] the *occupation of William Padwick. The road was an occupation road, and used by Padwick and Hawkins. The road was distant about fourteen yards from where King stood. William Frederick Padwick, who holds a deputation from William Padwick, the lord of the manor, jumped over the hedge into Hawkins's field, went up to King, and said "What are you up to?" King replied, "I'm come to shoot a rabbit: my master (Hawkins) told me I might come and kill a rabbit for my wife, who has been confined."

Loddard, a witness, who accompanied William Frederick Padwick, stated that King said that Hawkins, his master, had asked him if he knew anything about wiring, and that he had replied by saying that he knew nothing of wiring; and that William Frederick Padwick thereupon called Loddard, who took the gun from King, and handed him over to the custody of the police, by whom he was taken to the Havant station, and locked up for the night upon a charge of night-poaching,—which the justices strongly reprobated.

King stated in defence, that he went into his master's field, with the leave of his master, to kill a rabbit for his wife: and he called Hawkins, his master, who proved that he was the occupier of the field as part of the manor farm, that he had succeeded James Christmas, under an agreement with William Padwick, as tenant upon the terms generally of Christmas's lease, of which there had been no assignment, and that he had constantly killed rabbits on the land in his occupation, and that the terms of the lease, with regard to game, had been varied by the agreement.

The lease between William Padwick and James Christmas, dated the

10th of February, 1846, was put in. It contained the following reservation and covenant:—

"Except and always reserved unto the said William *Padwick, his heirs and assigns, and his and their friends, companions, and [*90 gamekeepers, free liberty from time to time and at all times during the term hereby granted, to hawk, hunt, course, shoot, fish, and fowl in and upon the said demised premises, or any part thereof."

"And also that the said James Christmas, his executors and administrators, shall and will use his and their utmost endeavours to preserve the partridges, pheasants, quails, hares, and other game, and also the fish in the ponds, and the spawn and eggs thereof, for the sole use and pleasure of the said William Padwick, his heirs and assigns, on the said demised premises; except, nevertheless, that the said James Christmas shall be at liberty to course hares on the said farm, in case the said William Padwick or William Frederick Padwick shall not keep hounds or greyhounds, but not otherwise."

The agreement between William Padwick of the one part, and Henry John Hawkins of the other part, dated the 6th of October, 1857, was put in, and showed that Hawkins had agreed to become the tenant of Padwick, "under and subject and upon the same conditions, covenants, clauses, and agreements in every respect (except as to the amount of rent) as in the lease of the said James Christmas severally specified," with an exception in reference to the game, in the words following,—"excepting that the said Henry John Hawkins shall have permission to sport over the said farm and lands."

The justices considered, that, under the circumstances, Hawkins was a quasi-assign of Christmas; that it was doubtful, under the terms of the reservation, whether Christmas and his assigns had not a concurrent right of sporting with Padwick; that rabbits were not mentioned in the reservation; and that the agreement of the 6th of October, 1857, conferred a right of *sporting upon Hawkins, which he might lawfully [*91 exercise to the extent of killing rabbits by his authorized servant. On these grounds, therefore, and on the authority of Spicer *v.* Barnard, reported in The Justice of the Peace of the 14th of May, 1859, they dismissed the information.

Lush, Q. C., for the appellant.—The question turns mainly upon the construction of the 30th section of the 1 & 2 W. 4, c. 32, which,—after reciting, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or *conies*, such person shall, on conviction thereof before a justice of the peace, forfeit and pay any sum of money not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction; and that, if any persons to the number of five or more together shall commit any trespass, by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justice

shall seem meet, together with the costs of the conviction: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and license of the occupier of the land so trespassed upon *92] shall not be a sufficient defence in any case where *the landlord, lessor, or other person shall have the right of killing the game upon such land, by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license." The 8th section of the act provides that "nothing in the act contained shall authorize any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where, by any deed, grant, lease, or any written or parol demise or contract, a right of entry upon such land for the purpose of killing or taking the game hath been or hereafter shall be reserved or retained by or given or allowed to any grantor, lessor, landlord, or other person whatsoever." It appears from the statement of the case that Padwick, the landlord, had demised the land in question to Christmas, with an express reservation of the right of sporting, and a covenant by the lessee to use his utmost endeavours to preserve the partridges, pheasants, and other game for the sole use and pleasure of the lessor. And Hawkins, who succeeded him as tenant, was to hold the land upon the same terms as in the lease to Christmas, except that he was to have permission to sport over the farm: but that exception was a mere personal privilege given to him, and did not authorize him to permit any other person to take game for his own benefit. The case, therefore, clearly falls within the 30th section of the act, and the justices ought to have convicted the respondent.

Powell, for the respondent.—The respondent, having the permission *93] of Hawkins to go upon the land and *shoot a rabbit, was to all intents and purposes in the same position as Hawkins himself. If he had had a rabbit in his house killed by himself, there can be no doubt that he might have given it to the respondent: and it was equally competent to him to say to the party,—"Go and shoot a rabbit for me, and take it home with you." The case of Spicer, app., Barnard, resp., 28 Law J., M. C. 176, is precisely in point. There, the tenant of a farm, the right of sporting over which was reserved to the landlord, employed the appellants to kill rabbits upon the farm: they were proceeded against under the 1 & 2 W. 4, c. 32, s. 30, and convicted: and it was held, that the tenant himself could not be so convicted, and that the appellants, having acted by his directions, had the same rights in this respect as he had, and therefore that the conviction was bad. Lord Campbell there says: "The fair inference to be drawn from the facts stated in the case, is, that Spicer employed the appellants to kill the rabbits for himself, not that he was giving them a right to have a day's sport upon the land, but to do that which he himself was entitled to do. Under section 12, he was entitled to give them such directions: the legislature intended by that section to give him power to kill rabbits himself; and, if we were to put another construction upon that pro-

vision, the act would be most oppressive in its operation. I think, that, having the right, he was justified in employing other people to do that which he himself might do." Erle, J., said,—"I cannot help thinking that that 12th section was intended to be confined to game as defined in the 2d section of the act, and that section 30 was intended to apply to trespassers coming upon the land, that is, to persons other than the tenant himself. Those persons are to be liable to a penalty, notwithstanding that they have obtained the leave and license of the occupier of the land trespassed upon; *and they are a class distinct from [*94 the tenant and persons employed by him, as his servants, to kill the rabbits." And Crompton, J., said,—"If the tenant could kill the rabbits himself, he could do it also by his servants, for, it cannot be said that he is bound to do it by his own hand: he would require some one to assist him if he himself went out to kill them; and, if he sends out his servants to do the act, it is just the same as if he did it himself." [ERLE, C. J.—There, the parties were hired to kill the rabbits for the tenant's benefit.] So, here, King was acting under the direction of Hawkins, the occupying tenant, who had a right of sporting over the land. [BYLES, J.—He acted by the license of Hawkins, but for his own benefit.]

Lush, in reply.—In the case of Spicer, app., Barnard, resp., the tenant employed the other parties to kill the rabbits for his benefit. But here King was not acting as the servant or for the benefit of Hawkins. The present case is therefore expressly within the prohibition of the 30th section.

ERLE, C. J.—I am of opinion that the decision of the justices in this case was right, and ought to be confirmed. I take it to be entirely within the principle of Spicer, app., Barnard, resp. Hawkins, the tenant, clearly had the right to kill and cause to be killed conies upon the land in his occupation: and there can be no question, that, if he had employed King or anybody else to shoot rabbits there for him, whether to make presents of them, or for his own consumption, that would have been perfectly lawful. The justices have found that King, a labourer in the employ of Hawkins, was killing a rabbit for his master. I cannot say that it was not perfectly lawful for Hawkins, who knew that the wife of one of his labourers was recently *confined, to [*95 say to the man "Go and shoot a rabbit, and take it to your wife." I think the justices were well warranted in finding that the case came within the principle of Spicer, app., Barnard, resp., and that their decision ought to be upheld. The case is very different from that of an authority given to a stranger to shoot over the land. Here, the man was a labourer on the farm. There is much worth consideration in the other point, as to whether rabbits were within the reservation of the game. It is not a reservation to the landlord exclusively: it is rather peculiarly worded, and is qualified by the right of the assignee to sport over the land. It is unnecessary, however, to go into that question, because, upon the other ground, I think the decision of the justices was quite right.

CROWDER, J.—I also think that the decision of the justices may be sustained upon the ground stated by my Lord. Substantially and in fact the rabbit was killed by the order of Hawkins. It could not be doubted, that, if King had gone to his master and said, "My wife is ill,

and I should like to have a rabbit for her," and Hawkins, his master, had said "Go and shoot one," King would have been acting under his master's orders. The only difficulty in the case arises from the statement made by King himself, viz., that his master told him he might go and kill a rabbit for his wife. But I think the justices were warranted in holding that he was substantially acting under the orders and for the benefit of his master, and therefore that the case came within the principle of the case of Spicer, app., Barnard, resp. As to the other point,—the reservation of the right of sporting,—if it were necessary to pronounce any opinion upon it, I should think it deserved a good deal of consideration.

*96] *BYLES, J.—The justices had before them the case of Spicer, app., Barnard, resp., where the distinction between a leave and license to shoot and a command of a master to his servant to kill rabbits is pointedly put. That being so, it is impossible to say that they might not well have found from the evidence before them that King was acting as the servant and by the direction and command of Hawkins. Their decision therefore must be confirmed, with costs.

Order affirmed, with costs.

MANLY *v.* FIELD. *Nov.* 4.

To sustain an action for seduction, it is necessary to show something like the relation of master and servant, however slight the degree.

Where the daughter rented a house, and carried on the business of a milliner at the time of her seduction,—Held, that the circumstance of her mother and the younger branches of her family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), did not constitute such "services" as to entitle the father to maintain the action.

THIS was an action for the seduction of the plaintiff's daughter. The declaration, in the usual form, alleged that the person whose seduction was complained of was the daughter and servant of the plaintiff.

The defendant pleaded,—first, not guilty,—secondly, that the daughter was not the servant of the plaintiff, as alleged: upon which pleas issue was joined.

The cause was tried before Blackburn, J., at the last Assizes at Croydon. The evidence was as follows:—The daughter, who at the time of the occurrence complained of was about thirty-two years of age, had always resided with her father and mother as part of their family down to the year 1854. The father then left them and went to lodge elsewhere. The daughter took a house in her own name, in which she

*97] carried on the business of a milliner, and thereby helped to *maintain her mother and the younger members of her father's family. The seduction took place in 1856, when the daughter was on a temporary visit at the house of her sister, in the neighbourhood of the defendant's residence. The furniture in the house belonged to the father, and he occasionally visited his family there, and contributed something to their support. It appeared that the father was in pecuniary difficulty at the time the house was taken.

On the part of the defendant it was submitted that there was no evidence of service to support the declaration.

The learned judge, being of that opinion, nonsuited the plaintiff, but reserved leave to him to move to set aside the nonsuit and enter a verdict for 40*s.*, if the court should be of opinion that there was any evidence which ought to have been left to the jury.

Lush, Q. C., now moved accordingly.—In actions of this kind, the slightest evidence of service is sufficient: per Buller, J., in Bennett *v.* Allcott, 2 T. R. 166. [CROWDER, J.—What service was there here? The daughter, it seems, took the house for herself.] It was the only home of the family. [CROWDER, J.—When the daughter is at the time of the seduction living under her father's roof, very slight evidence of service has always been considered sufficient to sustain the action. But here the daughter rented the house and permitted her mother and the younger branches of the family to reside in it with her, the father living elsewhere.] The daughter is not the less a member of her father's family because circumstances of convenience or necessity induce him to reside elsewhere. [WILLIAMS, J.—The house was the daughter's house: she might at any time have turned out her mother and the children.]

*ERLE, C. J.—I think the nonsuit in this case was quite right. There was no evidence whatever of services due or rendered by the [*98 daugher to her father at the time the seduction took place. In truth, the daughter was the head of the family, conferring benefits on her mother and the younger children, and not a subordinate member of the household so that she could be said to render even the slight kind of services which suffice to sustain an action of this sort.

WILLIAMS, J.—I am of the same opinon. However painful it is to make the maintenance of an action of this kind depend upon services rendered by the daughter to her father, still, as the law is so, we are bound by it.

CROWDER, J.—I also am of opinion that the nonsuit was right. There is not the slightest pretence for this motion. It appears that the daughter was thirty-two years of age, and was residing in a house of which she was the tenant, her mother and the younger branches of her family residing with her, and partially supported by the proceeds of her business of a milliner. Very slight services will suffice, where the daughter is residing with her father as a member of his family. But here she was permanently away from her father,—the mistress of an establishment of her own.

BYLES, J., had gone to chambers. Rule refused.(*a*)

(*a*) See Griffiths *v.* Teetgen, 15 C. B. 344 (E. C. L. R. vol. 80).

*STEVENS *v.* GOURLEY. *Nov.* 3. [*99

A contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, cannot be enforced.

A structure of wood, of considerable size (16 feet by 13), and intended to be permanently used as a shop, is a "building" within the 18 & 19 Vict. c. 122, although not let into the ground, but merely laid upon timbers upon the surface.

THIS was an action for work and labour, money lent, &c., and money found due upon accounts stated.

The defendant pleaded, amongst other pleas,—thirdly, that the said work was done and the said materials were provided by the plaintiff under an illegal contract between the plaintiff and the defendant, made after the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), came into operation, to wit, on the 5th of December, 1858, for the erection of a certain building within the metropolis as defined by the act passed in the session of parliament held in the 18th and 19th years of Her Majesty's reign, intituled "An act for the better local management of the metropolis," 18 & 19 Vict. c. 120), which building was a new building within the meaning of the said building act, and was not within any of the exemptions in the said act mentioned, which building it was agreed by and between the plaintiff and the defendant should be enclosed with walls constructed of wood, and not of brick, stone, or any other hard or incombustible substance, contrary to the form of the statute in such case made: That the plaintiff, before and at the time of making the said contract, was a builder, and that the said contract was entered into by the defendant at the suggestion of the plaintiff; and that the plaintiff, before and at the time of making the said contract, represented to the defendant that the said building might be lawfully erected, and was not contrary to the law, and that the defendant, when he entered into the said contract, believed the said representation, and did not know to the contrary thereof and entered into the said contract, and allowed the
*100] said work to be done, and the said materials to be provided, *and stated the said accounts, believing the said representation to be true: That the said work was illegally done, and materials were illegally provided by the plaintiff in and about constructing the said building, within the limits of the metropolis as aforesaid, with such walls as aforesaid, contrary to the said statute; and the said accounts were stated concerning the money claimed by the plaintiff to be due to him from the defendant under the said illegal contract, and for the said work and materials so illegally done and provided; and the money which the plaintiff alleged was found to be due upon the said accounts was the money so claimed: That, after the said work had been so done, and the said materials had been so provided, and the said accounts had been so stated, the district surveyor gave the plaintiff's sub-contractor, then being the builder engaged in erecting the said building, due notice to remove the said work within forty-eight hours, that is to say, to pull down the said building: That, the plaintiff and his sub-contractor having failed to comply with the said notice, the said district surveyor caused complaint to be made before a magistrate of the police courts of the metropolis, duly authorized in that behalf; and the said sub-contractor was thereupon duly summoned to appear before the said magistrate according to the said act; and the said magistrate thereupon duly ordered and commanded the said sub-contractor to comply with the requisitons of the said notice; and that the plaintiff, or the said sub-contractor, or the said district surveyor, pulled down the said building, the same being necessary for enforcing the requisitions of the said notice, and for bringing the said building and work into conformity with the rules of the said act: That all conditions precedent, necessary matters and things were done in that behalf to justify and render neces-
*101] sary the pulling down of the said *building: And that, by reason of the premises, and of the said work and materials being so done

and provided by the plaintiff illegally and contrary to the said statute, the defendant never derived any benefit or advantage whatever from the said work or materials, or any part thereof. Issue thereon.

The cause was tried before Martin, B., at the last Spring Assizes, at Lewes. The facts which appeared in evidence were as follows:—The defendant being desirous of having a shop erected on the fore-court of his premises in Bentinck Terrace, Regent's Park, applied to the plaintiff, a builder, who accordingly made out and sent to him a specification and contract, as follows:—

"Specification of works required to be done at No. 1, Bentinck Terrace, Regent's Park, for D. D. Gourley, Esq.

"Excavator,—To dig out and remove clay to level of pavement, 16 feet back and 14 feet wide, to receive house.

"Bricklayer,—To build three courses of footings and sleeper-walls, bed all quartering in mortar.

"Carpenter,—To erect in wood a house, the dimensions to be 16 feet from front to back, and 13 feet 8 inches frontage; the height to be 13 feet frontage, and 9 feet from floor to floor. To be built of quartering 3 × 2, and weather-boarded on outside, also to be match-boarded all over the inside. Ground-floor joists to be 4½ × 2, on sleepers 2 × 3, with ¾-inch yellow deal flooring, properly laid; also to put ceiling-joists 3 × 2, rough-boarded on top, and match-boarded under, with one sky-light in roof; the whole of the roof to be covered with zinc, with proper fall for water; the front to be made with two sashes, with doors in centre, with all pilasters, mouldings, &c., as shown on plan, with 1½ inch bead and butt shutters, stall-boards, &c., complete; *cross-partition, [*102 to be framed of 1½ inch yellow deal, with glass in upper part, with 1½ inch framed door in centre; and leave all perfect.

"Zinc-work,—To cover the whole of the roof with No. 9 zinc, properly solder all joints, eaves, &c.

"Smith,—To provide all locks, bars, nails, screws, &c., necessary for the completion of the aforesaid works.

"Painter,—To paint the whole of the works in three oils outside and inside, and leave all perfect.

"I hereby undertake to complete the whole of the aforesaid works, to the satisfaction of Mr. Gourley or his surveyor, as per specification, for the sum of 58*l*. To be completed on the 18th of December, 1858.

"JOHN STEVENS."

Before the work was commenced under the above contract, the plaintiff, with a view to evade the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, proposed that a wooden foundation should be substituted for brick. This proposal was conveyed to the defendant in the following letter:—

"21, Western Terrace, Westbourne Grove.

"To D. Gourley, Esq.

"Dear Sir,—I have just considered, and found out a new plan for us to work on in reference to the shop in Bentinck Terrace, which is, to build it all in wood: it will be less expense, and answer your purpose just as well, and it will look as well; and then we shall evade the metropolitan board of works, and the district surveyor also. It will last

quite long enough, and answer all you require. If you consider it over, and write me this evening, I will put it in hand at once.

"JOHN STEVENS.

"P. S. I think 50*l.* will pay that."

*103] *On the 10th of November, the defendant again wrote to the plaintiff, as follows:—

"21, Western Terrace, Westbourne Grove.

"To D. Gourley, Esq.

"Dear Sir,—The plan of building the shop will be a fac-simile of what you have: the elevation will be just as I show you on the plan; the only difference will be, wood instead of brick-work. You would not know the difference in any other way, and the cost of erection will be 55*l.* I have thoroughly gone into the matter, and therefore assure you it cannot be erected for less.

"JOHN STEVENS."

The work proceeded in the altered manner suggested, without any brick footings or foundations, but the frame-work merely resting on wooden joists laid upon the earth, without being in any way fixed thereto. The shop being thus erected, Way, a builder who did the work under a sub-contract with the plaintiff, was summoned by the district surveyor before a police magistrate under the 45th section of the Metropolitan Building Act for not having given the notice required by that act, and also for erecting a structure in a manner prohibited by the act. The plaintiff attended before the magistrate with Way at the hearing, and took some objections to the proceedings, which the magistrate overruled: and Way consented to an order being made for the removal of the structure complained of, and for a mitigated penalty of 40*s.*

In obedience to the order, Way accordingly removed the shop, by merely lifting it off the timber upon which it had rested, and carried it to his own premises.

There being some evidence that the defendant had accepted the building when completed, the jury returned a verdict for the plaintiff for 25*l.*, the balance due according to the contract, 30*l.* having been *104] previously *paid on account; leave being reserved to the defendant to move to enter a verdict for him on the issue taken on the third plea, if the court should be of opinion that the contract, being in contravention of the Metropolitan Building Act, could not be enforced.

Montagu Chambers, Q. C., in Easter Term last, obtained a rule nisi accordingly.

Barnard now showed cause.—There was no evidence to sustain the third plea. The structure in question was not a "building" within the 18 & 19 Vict. c. 122. It is a mere shell or frame of wood, having no foundations or walls, and in no way fixed to the ground, but merely laid on timbers upon the surface so as to be capable of being lifted off without disturbing anything. There is no definition of "building" in the act, but there is of "new building" in s. 8, which enacts that "a building shall be deemed to be new, whenever the enclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856: any other building shall be deemed to be an old building." And art. 1 of the first schedule provides that "every building shall be enclosed with walls constructed with brick, stone, or other

hard and incombustible substances, and the foundations shall rest on solid ground, or upon concrete, or upon other solid sub-structure." [ERLE, C. J.—I do not see why a structure of wood may not be within the act. There is nothing in the absence of foundations, nor in the portability of the thing. There are many buildings in the neighbourhood of Greenwich, which, from the nature of the soil, are only rested on concrete on the surface. BYLES, J.—You must contend that a wooden structure as large as Westminster Hall, laid upon the ground, as this was, would not be a "building." *There is no inconsistency in speaking of a "removable building."] It is submitted [*105 that, to constitute a building within the act, the structure must at least be of a substantial and permanent character. Further, it is submitted that the proceeding before the magistrate was not binding on the plaintiff. He was no party to it, Way, the sub-contractor, being the person summoned; consequently he would have no right of appeal under s. 106. [BYLES, J.—The decision of the magistrate was a sort of compromise; and the plaintiff appears to have assented to it.]

Montagu Chambers, Q. C., and *Joyce*, in support of the rule.—The third plea was clearly proved, assuming this to be a "building" within the act. The description of it in the specification indicates a building. It is clearly within the mischief of the act; and the correspondence shows that it was intended to be permanent. It is perhaps impossible to give an accurate definition of a "building." The 8th section was framed to meet the case of a structure the walls of which had not been carried above the footings before the 1st of January, 1856: any other is to be deemed an "old building." If this structure were of the clear yearly value of 10*l.* a year might not the occupier have acquired a vote in respect of it, under the 27th section of the Reform Act, 2 W. 4, c. 45? [CROWDER, J.—Is there any case where a structure like this, which is not in any way attached to the soil, has been held sufficient to give a vote? Would a photographer's travelling van with the wheels off be sufficient?] There is no reason why it should not, if it were intended permanently to rest where it is placed. [ERLE, C. J.—If the erection of such a structure as this is an act prohibited by law, an indictment would lie for it. But I find no direct prohibition in the act against the *erection of wooden structures.] Every building is by s. 31, to [*106 be subject to the supervision of the district surveyor; and the 38th section provides that notice shall be given to him two days before "any building" is commenced. [ERLE, C. J.—The building a structure of wood is quite independent of the notice to the surveyor.] As to the proceedings before the magistrate. The plaintiff was in substance a party to them: the acts of his sub-contractor, Way, were substantially the acts of the plaintiff himself.

ERLE, C. J.—I am of opinion that this rule should be made absolute. It appears to me that the ultimate contract which was come to between these parties was for the erection of a building known to the plaintiff to be,—or, whether known to him or not, at all events it was,—in violation of the Metropolitan Building Act, 18 & 19 Vict. c. 122. It would be difficult with accuracy to define what is a "building" within the meaning of the statute: and I do not mean to attempt it.(*a*) But I think

(*a*) Bailey and Johnson define a building to be "a fabric, an edifice;" and Webster, "a fabric or edifice constructed for use or convenience, as, a house, a church, a shop, &c." Richardson has no definition of the word.

the structure in question was a building within the act. The contractor himself in his specification calls it a "house," and in his letters a "shop." The original contract contemplated the erection of a structure upon a permanent brick foundation, such as would probably last as long as the defendant's interest in the house to which it was to be attached: but by the substituted contract it was to have a timber foundation in lieu of the footings of brick-work. It appears from the letters which were put in that the wooden structure so to be raised was clearly intended to answer
*107] all the purposes of that which was before *called a house or a shop. The structure originally contemplated clearly would have been a building within the act; and the substitution of the wooden joists for the brick foundation was designed to "evade the metropolitan board and the district surveyor also." I am clearly of opinion that the plaintiff was wrong in that notion, and that a house or shop constructed like this, whether resting on brick foundations or merely upon timber laid upon the ground, is pre-eminently within the mischief the statute was intended to remedy: and I think that the 12th section does command that all walls shall be constructed of such substances, and of such thickness, and in such manner as are mentioned in the 1st schedule. And when we turn to the 1st schedule, we find that "every building shall be enclosed with walls constructed of brick, stone, or other hard and incombustible substances, and the foundations shall rest upon solid ground or upon concrete, or upon other solid sub-structure." That seems to me to be a distinct command to build the walls of incombustible materials, and a prohibition against building them of combustible materials; and therefore the contract between these parties was a contract for the erection of a structure in a manner prohibited by law. This is a sufficient answer to that part of the argument urged on the part of the plaintiff as to the absence of footings or foundations of brick. A good deal of the argument on the part of the plaintiff also rested upon the fact of the structure having been removed in its entirety, and without displacing anything, which, it was said, proved conclusively that it was not a house. The answer to that, however, appears to me to be, as I before suggested, that the contract was for a *house* or *shop;* and that the structure was permanently built and reasonably calculated for the use of man; and
*108] though by the application of mechanical power a *structure of considerable size may be removed, it does not therefore cease to be a "building" within the meaning of the act. Upon the whole, I think this was a contract for the erection of a fabric or structure in violation of the statute; and that, the parties being in pari delicto, potior est conditio defendentis. My judgment is given entirely irrespective of the opinion pronounced by the magistrate.

WILLIAMS, J.—I am of the same opinion, though I come to this conclusion not without some doubt and hesitation. My doubt is founded upon this. I agree that a structure of this description is within the mischief contemplated by the statute, and therefore, if the act can be construed so as to include it, that it ought to be so construed. But, on the other hand, it is equally clear that we ought not to put this construction upon the statute, however beneficial it may be to the public, if it be apparent from the language they have used that the legislature did not mean to point at such a structure as this. The doubt upon my mind arises thus. The 7th section enacts, that, with certain exemptions

before mentioned, the act shall apply to all new buildings: and then s. 8 enacts that a building shall be deemed to be new, whenever the enclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856; and that any other building shall be deemed to be an old building. Suppose this structure had been partially carried into effect on the 1st of January, 1856, could it be said to be a "new building" within the act? That would have to be determined by the application of the parliamentary test, viz. whether the enclosing walls had or had not been carried higher than the footings previously to the 1st of January, 1856. But that test could not be applied, seeing that there are no *footings. The contention upon this is, that the legislature only intended that the act should apply to structures raised upon footings, and consequently that this one could not be within it: but I cannot help entertaining some doubt whether the statute was intended to apply to any sort of structure to which the test could not be applied. My Lord and my two learned Brothers entertain a different opinion, and my doubt is not so strong as to induce me to dissent from their judgment. Assuming, then, that this shop was a "building" within the statute, the rest of the case is clear. There has been a plain infringement of the act, and the plaintiff is disentitled to recover, upon the principle laid down in the case of Foster *v.* Taylor, 5 B. & Ad. 887 (E. C. L. R. vol. 27), where it was held that the vendor of butter in firkins not branded as required by the 36 G. 3, c. 86, could not recover the price of it. That case is a distinct authority to show that the plaintiff cannot be allowed to enforce in a court of justice a contract which has been entered into in violation of the provisions of an act of parliament. The latter part of the plea, which was added ex abundanti cautelâ, becomes immaterial in this view, the earlier part being a good bar. For these reasons, I think the rule must be made absolute. [*109

CROWDER, J.—I also am of opinion that this rule must be made absolute, upon the ground alleged in the third plea and established in proof, viz. that the contract declared on was entered into and carried into effect in express violation of the Metropolitan Building Act. I agree with my Brother Williams that the rest of the plea is immaterial. It would, no doubt, have been more satisfactory if the statute had given a definition of a "building." That, however, has not been done; nor has any authority been cited to show what is a *building; neither will I attempt to define it. The question for us to determine, is, whether the structure contracted for and erected by the plaintiff for the defendant is such a one as we can pronounce to be a "building" within the meaning of the act. Looking at the facts, and at the specification and the correspondence, it appears to me to be quite clear that the original intention of the parties was that a structure should be erected about which it would be impossible to entertain a doubt. That intention seems from the two letters put in to have been abandoned, and an endeavour to have been made to evade the provisions of the act. But, notwithstanding that, it appears to me to have been still the intention of the parties to erect a *permanent* structure; and it is with reference to its being a permanent structure that I come to the conclusion that it is a "building" within the meaning of the statute. The plaintiff writes, —"I have found out a new plan for us to work on in reference to the shop, which is, to build it *all* in wood; it will be less expense, and answer [*110

your purpose just as well, and it will look as well; and then we shall evade the metropolitan board of works, and the district-surveyor also. *It will last long enough, and answer all you require.*" The structure originally intended was to last a considerable time, and the alteration suggested, viz. to substitute wood for the brick foundation or footings was not with a view to its being a less permanent structure. The difficulty which occurred to my mind during the argument was this: the 1st article of the 1st schedule, which is referred to in s. 12, and which states how the walls of every building shall be constructed, says "the foundations shall rest on the solid ground, or upon concrete, or upon other solid sub-structure,"—thus seeming to assume, that, whatever the structure, to be a "building," it must be something which has *foundations. And the question arises whether this structure has any foundation at all. But, upon the whole, I agree with the Lord Chief Justice that it is enough that there is a foundation of some kind to which the superstructure is to be attached. As to the 8th section, which has been referred to, and which provides that "a building shall be deemed to be new whenever the enclosing walls thereof have not been carried higher than the footings previously to the 1st of January, 1856,"—it seems to me that that was only intended to bring within the operation of the statute one description of building, viz. a building of which only the footings or foundation had been laid. It is difficult to say that that was meant to be the only definition of an unlawful construction. It could hardly, I apprehend, be contended, that, if the timbers upon which this structure rested had been let into the ground five or six feet, it would not have been a building within the act. Upon the whole, and mainly on the ground that this was a structure of some considerable magnitude, and erected for use as a shop, and substantially put together, and for a permanent purpose, I am clearly of opinion that it is a "building" within the meaning of the act. That it is a structure within "the mischief of the act," as the phrase is, I think nobody can doubt; and, if we can find language in the act reasonably to include it, I think we are bound to give effect to it. The contract, therefore, being for the erection of a building in violation of the act, the plaintiff is not entitled to enforce it.

*111]

Byles, J.—I also am of opinion that the rule to enter a verdict for the defendant in this case must be made absolute. The profound respect I entertain for the opinion of my Brother Williams, and the doubt he has expressed, have alone induced me to hesitate as to the *conclusion we ought to arrive at. I agree with my Brother Crowder that the 8th section applies only to buildings of a particular class, and was merely intended to define the stage of progress on a particular day which should mark the distinction between an old and a new building,—leaving quite independent the 12th section and schedule there referred to, as to the erection of fabrics of incombustible substances. That being so, the question, and the only question, is, whether the subject-matter of this contract was a "building" within the fair meaning and contemplation of the act. And that brings us to the very difficult inquiry, What is a "building?" Now the verb "to build" is often used in a wider sense than the substantive "building." Thus, a ship or a barge-builder is said to build a ship or a barge, a coach-builder to build a carriage; so, birds are said to build nests: but neither of these when con-

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structed can be called a "building." It is a well-established rule, that the words of an act of parliament, like those of any other instrument, must if possible be construed according to their ordinary grammatical sense. The imperfection of human language renders it not only difficult, but absolutely impossible, to define the word "building" with any approach to accuracy. One may say of this or that structure, this or that is not a building; but no general definition can be given; and our lexicographers do not attempt it. Without, therefore, presuming to do what others have failed to do, I may venture to suggest, that, by "a building" is usually understood a structure of considerable size, and intended to be permanent, or at least to endure for a considerable time. A church, whether constructed of iron or wood, undoubtedly is a building. So, a "cow-house" or "stable" has been held to be a building the occupation of which as tenant entitles the party to be registered as a voter under the 27th section of the *Reform Act, 2 W. 4, c. 45.(a) On the other hand, it is equally clear that a bird-cage [*113 is not a building, neither is a wig-box, or a dog-kennel, or a hen-coop,—the very value of these things being their portability. It seems to me that the structure in question, which was erected for a shop, and is of considerable dimensions, and intended for the use of human creatures, is clearly a "building," in the common and ordinary understanding of the word. If we look at the object and intention of the act, we find that this construction is the only one which will bear it out. The intention,—the main intention,—was, to prevent the metropolis from being covered with combustible structures. Looking, therefore, at the ordinary meaning of the word, and at the intention of the legislature, I think we are well warranted in coming to the conclusion that this was a "building" within the prohibition of the statute, and consequently that the third plea was proved, and the defendant entitled to judgment upon it.

Rule absolute.

(a) See Whitmore, app., Wenlock (Town Clerk), resp., 7 Scott N. R. 489, 5 M. & G. 9 (E. C. L. R. vol. 44), 1 Lutw. Reg. Cas. 10; Peele, app., Downes, resp., 7 Scott N. R. 495, 5 M. & G. 13 n.; Poole, app., Williams, resp., 7 Scott N. R. 496, 5 M. & G. 13 n.

*HUCKLE *v.* REYNOLDS. *Nov.* 4. [*114

The plaintiff brought an action for speaking these words,—"Your house is a bawdy-house, and no respectable people will live in it." The words proved were addressed to the *plaintiff's wife*, and were as follows,—"You are a nuisance to live beside of. You are a bawd: and your house is no better than a bawdy-house:"—Held, that the words were actionable without special damage, and substantially supported the declaration.

THIS was an action brought by the plaintiff, a painter and glazier, against the defendant, a waiter, for slander. The words charged to have been spoken by the defendant were,—"Your house is a bawdy-house, and no respectable people will live in it." No special damage was alleged or proved.

The plaintiff's wife, who was called to prove the speaking of the words, proved that they were addressed to her and not to the plaintiff, and were as follows,—"You are a nuisance to live beside of. You are a bawd; and your house is no better than a bawdy-house."

On the part of the defendant it was submitted that the words were not proved as laid. But Cockburn, C. J., before whom the cause was tried at the sittings at Westminister after the last Trinity Term, intimated that he would allow the declaration to be amended.

It was then submitted that the words were not actionable, and that the slander being a personal wrong to the wife, she should have been a party to the action.

His lordship, however, overruled the objection; and the jury found a verdict for the plaintiff, damages 40*s*.

Joyce, pursuant to leave reserved, now moved for a rule calling upon the plaintiff to show cause why a nonsuit should not be entered. He submitted, that, taking the words spoken to have been those proved by the witness, they were not actionable without proof of special damage; and that, as they merely contained an imputation upon the wife's personal character for chastity, she ought to have been a party to the action.

*115] *ERLE, C. J.—The words are clearly actionable without special damage. It is impossible to deny that they charge an indictable offence; and the words proved would impute that to the plaintiff. It was unnecessary, therefore, to make the wife a party to the action. I think there ought to be no rule.

WILLIAMS, J.—If the jury thought the words meant to impute to the plaintiff that he kept a bawdy-house, they were clearly actionable; and the evidence warranted the verdict.

CROWDER, J.—The substantial meaning of the words as alleged in the declaration was proved. There will be no rule. Rule refused.

WALMSLEY and Another, Assignees of THOMAS MOORE, a Bankrupt, *v.* MILNE. *Nov.* 11.

Where the owner of the inheritance annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold.

A., the owner of land, in 1853 mortgaged it in fee to B., and afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, and bath-proprietor, he affixed a steam-engine and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way; and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or the floors for the purpose of steadying them, *but were all capable of being removed without any injury either to themselves or to the premises*. The engine was used to supply water to the baths and to put the other machines in motion; and the whole were subservient to the business carried on by A.

A. continued in possession until 1858, when he became bankrupt:—Held, that his assignees were not entitled to claim these fixtures, but that they passed to the assignee of the mortgagee as part of the freehold.

THIS was an action of detinue brought by the plaintiffs, as assignees of one Thomas Moore, a bankrupt, to recover a steam-engine and boiler,

*116] a hay-cutter, a *malt-mill or corn-crusher, and a pair of grinding-stones, which they claimed as having passed to them as goods and chattels in the order and disposition of the bankrupt at the time of his bankruptcy.

The defendant pleaded non detinet and not possessed, whereupon issue was joined.

The cause was tried before Byles, J., at the last Spring Assizes at Liverpool. The facts which appeared in evidence were as follows:—The bankrupt, Moore, was the owner of a vacant plot of ground, which he mortgaged in fee in 1853 to one Oswald. On the 20th of August, 1858, Oswald assigned his interest in the mortgaged premises to the defendant. Subsequently to the mortgage, and before the conveyance to the defendant, Moore, who continued in possession, erected various buildings upon the land, where he carried on the business of a brewer and innkeeper and proprietor of baths, and set up therein the articles in question,—the steam-engine being used for supplying water to the baths, and also for setting in motion the hay-cutter, malt-mill, and grinding-stones; the hay-cutter and malt-mill being fastened to the buildings with screws and nuts, but being capable of being removed without injury to the premises or to themselves; and the lower grinding-stone being boxed on to the floor, and the upper stone attached with running-gear in the usual way. The whole were put up for the purpose of Moore's trade.

Moore became bankrupt in September, 1858, and the plaintiffs, as his assignees, claimed the articles in question, insisting that they were not "fixtures," inasmuch as they were not permanently fixed so as to form part of the freehold, or that, if fixtures, they were "trade fixtures," and therefore removable.

The defendant, on the other hand, insisted that, whether fixtures or not, the things passed by the mortgage as part of the freehold.

*Under the direction of the learned judge, a verdict was entered for the plaintiffs, leave being reserved to the defendant [*117 to move to enter a verdict for him in respect of all or such of the articles as the court should think were not severable from the freehold.

Atherton, Q. C., in Easter Term last obtained a rule nisi accordingly. He referred to Horn *v.* Baker, 9 East 215, and Boydell *v.* McMichael, 1 C. M. & R. 177.†

James Wilde, Q. C., and *Milward*, on a subsequent day, showed cause.—The articles in question were not fixtures at all, because not permanently attached to the freehold, but were mere movable chattels which passed to the assignees; or, if fixtures, having been put up by the bankrupt for purposes of trade, they were removable by the bankrupt before his bankruptcy, and consequently upon his bankruptcy became the property of the assignees. All the articles were fixed in the same way to the floor or to the walls of the buildings, viz. by means of screw-bolts and nuts, and were severable without injury either to themselves or to the premises upon which they were fixed. The articles in this case clearly come within the test applied by Parke, B., in Hellawell *v.* Eastwood, 6 Exch. 295, 312.† The contention there was as to the removability of cotton spinning-machines called mules, which were some of them fixed by screws to the wooden floor of the mill, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into the holes. In delivering the judgment of the court, Parke, B., says: "The question is, whether the machines when fixed were parcel of the freehold; and this is a question of fact, depending on the circumstances of each case, and principally on two

considerations,—first, the mode of annexation to the soil or fabric
*118] *of the house, and the extent to which it is united to them, whether it can easily be removed, integrè, salvè, et commodè, or not, without injury to itself or the fabric of the building,—secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the civil law, perpetui usus causâ, or in that of the Year Book 28 H. 7, 10, pour un profit del inheritance, or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. Now, in considering this case, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal without the least injury to the fabric of the building or to themselves; and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels. They were never a part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures, and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling as furniture, and which is probably the reason why they and similar articles have been held, in different cases, to be removable. The machines would have passed to the executor: per Lord Lyndhurst, Trappes *v.* Harter, 2 C. & M. 177.† They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of movable chattels." [BYLES, J.—The question there arose between landlord and tenant.] The steam-engine here was what is called a portable engine. [BYLES, J.—So as to be removable without being taken to pieces. It was a thing complete in itself, for the purpose of being removable
*119] from place to place.] It was attached to the *building for the sole purpose of being more conveniently used. The Court of Exchequer deal with the question as a general one, and not merely as a question between landlord and tenant. That case was followed by the Court of Queen's Bench in Waterfall *v.* Penistone, 6 Ellis & B. 876 (E. C. L. R. vol. 88). There, one Jenkinson mortgaged to Marsh the freehold of a mill, with machinery thereon; and afterwards Jenkinson assigned to the defendant the equity of redemption, and certain machinery which had been fixed in the mill since the first mortgage. Afterwards, by indenture, in consideration of 500*l.* paid to Jenkinson by the defendant, Jenkinson did bargain, sell, assign, and set over to the defendant machinery erected since the conveyance of the equity of redemption, subject to redemption on payment of the 500*l.*; and by the same indenture Jenkinson covenanted that the mill and machinery specified in the previous conveyance of the equity of redemption should be charged with the 500*l.* as well as the money before secured upon it. The machinery comprised in the last-mentioned indenture was erected for the purpose of carrying on the manufacture in the mill; and for the more conveniently doing so, a part of it was screwed, nailed, and otherwise fastened to the mill. Jenkinson become bankrupt; in anticipation of which the defendant took possession and entered on the mill and the machinery, Jenkinson having been in possession for more than twenty-one days after the making of the indenture, up to the time of such entry. The machinery comprised in the last-mentioned indenture still

remaining on the premises, Jenkinson's assignees claimed it, on the ground that such indenture had not been registered under the statute 17 & 18 Vict. c. 36. It was held that they were entitled to the machinery; the conveyance thereof being void as against them for want of registration; for, that, under the interpretation clause *(s. 7), the machinery was personal chattels, as the intention of the [*120 parties appeared to be that the machinery should pass separately from the realty, and so it had not become parcel of the freehold by annexation subsequent to the conveyance of the equity of redemption. Trappes *v.* Harter, 2 C. & M. 153,† 3 Tyrwh. 604, where the question arose, as here, between the assignees of a bankrupt mortgagor and the mortgagee, is also precisely in point. In January, 1797, several persons carried on business in partnership as calico printers; and in the same month certain premises on which their works were principally carried on were conveyed to one of the partners in fee. The conveyance mentioned the premises to consist, besides land, of dwelling-houses, machine-house, and other buildings and erections, and stated them to be then in the possession of the partner to whom they were conveyed and another partner. Various buildings and machines were afterwards, from time to time, erected on the premises by the firm, for the purpose of extending the works. The whole was firmly fixed to the freehold, and stood on that part of the land which was conveyed to one of the partners in 1797, but the part in question could be removed without material injury to the buildings. In the different stock-takings of the firm, the land and buildings were always valued and classed separately from the machinery and fixtures. In the part of the country where the premises were situated, machinery of this description was constantly bought and sold distinctly from the freehold. The freehold in the premises having been subsequently conveyed to two of the partners, they, in 1828, mortgaged them to the plaintiff's wife, under the description of all the messuages, dwelling-houses, lands, and buildings therein mentioned, "and also all that and those the steam-engine, mill-gearing, heavy gear to millwright *work, fixed machinery, and other matters and [*121 things, &c., then standing and being in and upon the thereby demised buildings, works, and premises, which in any manner constituted fixtures and appendages to the freehold of the same or any part thereof." All the machinery, fixtures, &c., appeared to have been in the reputed ownership of the parties, who carried on the works until 1831, when they became bankrupt, and the defendants were appointed their assignees. The plaintiff, who was the husband of the mortgagee, had inspected statements of the affairs of the partners, which treated the machinery as not included in the mortgage, and had made no objections to such statements. In the month of April, 1831, the assignee sold all the machinery and fixtures, with the exception of two steam-engines, two water-wheels, an iron flooring, and other small articles; and the greater part of them were removed by the purchasers. *The articles claimed by the mortgagee were all firmly fixed to the freehold, in such a manner, however, that they might easily be removed without material injury to themselves or to the buildings.* It was held that the machinery did not belong to the inheritance, but was part of the personal estate of the bankrupts, and that it passed to the assignees; and that the machinery in question was not intended to pass, and did not pass, to the

mortgagee under the mortgage-deed. [WILLIAMS, J.—Trappes *v.* Harter seems to have been considered as overruled as to this point: see per Parke, B., in Minshall *v.* Lloyd, 2 M. & W. 456,† and per Cresswell, J., in Wilde *v.* Waters, 16 C. B. 647 (E. C. L. R. vol. 81).] Colegrave *v.* Dias Santos, 2 B. & C. 76 (E. C. L. R. vol. 10), 3 D. & R. 255 (E. C. L. R. vol. 16), was not a case of trade fixtures. [WILLIAMS, J., referred to Hitchman *v.* Walton, 4 M. & W. 409.† There, a lessee for years mortgaged his lease, and all his estate and interest in the premises, and afterwards became bankrupt: and it was held that *122] the mortgage might declare *in case as reversioner against the assignee of the tenant, for the removal of fixtures from the premises, whereby they were dilapidated and injured; and that he was also entitled to recover in trover against such assignee the value of all the fixtures, whether landlord's or tenant's, which were affixed to the premises before the execution of the mortgage, although there was a covenant in the original lease to the mortgagor to yield up to the lessor, at the determination of the term, "all fixtures and things to the premises belonging *or to belong*."] In Mather *v.* Fraser, 2 Kay & J. 536, which was cited on the part of the defendant at the trial, the Vice-Chancellor (Wood) mainly rests his decision on the circumstance of the property mortgaged being described in the mortgage deed as a mill, which it could not be if the machinery were removed.

Atherton, Q. C., and *V. Williams*, were heard in support of the rule in Trinity Term.—As between landlord and tenant, the latter is at liberty to remove trade fixtures at any time during his original term, and such further period of possession by him as he holds the premises under a right still to consider himself as tenant: see Weeton *v.* Woodcock, 7 M. & W. 14,† Leader *v.* Homewood, 5 C. B., N. S. 546 (E. C. L. R. vol. 94), and the notes to Elwes *v.* Mawe (3 East 38), 2 Smith's Leading Cases, 4th edit. 147. The present is not, however, a case of landlord and tenant, but of mortgagor aud mortgagee,—the mortgagor having continued in possession by the sufferance of the mortgagee. [CROWDER, J.—You contend that the mortgagor could not have removed these articles?] He would have been guilty of waste if he had done so. [WILLES, J.—You say that whatever the mortgagor adds to the premises for the more convenient and profitable employment of them belongs to the mortgagee, and that the mortgagor has no right to *123] *remove it?] Precisely so. Lord Ellenborough, in his judgment in Elwes *v.* Mawe, referring to the case of Lawton *v.* Salmon, 1 H. Bl. 259, n., says,—"In the case of the salt-pans, Lord Mansfield does not seem to have considered them as accessory to the carrying on a trade, but as merely the means of enjoying the benefit of the inheritance. He says, '*the salt-spring is a valuable inheritance*, but no profit arises from it unless there be a salt-work; which consists of a building, &c., for the purpose of containing the pans, &c., which are fixed to the ground. *The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment of the principal. The owner erected them for the benefit of the inheritance.*' Upon this principle he considered them as belonging to the heir as parcel of the inheritance, for the enjoyment of which they were made, and not as belonging to the executor, as the means or instrument of carrying on a trade." It is an abuse of terms to say that the articles in question are not fixtures.

[WILLES, J.—The baths would be incomplete, as intended to be used, without the steam-engine. CROWDER, J.—The stable might very well be used as a stable without the corn-crusher or the hay-cutter.] The mode of fixing by means of bolts and screws was merely to keep them steady. In Fisher *v.* Dixon, 12 Clark & Fin. 312, the owner of land, for the purpose of better using the land, erected upon and affixed to the freehold certain machinery: and it was held, that, in the absence of any disposition by him of this machinery, it would go to the heir as part of the freehold estate; and that, if the corpus of such machinery belongs to the heir, all that belongs to that machinery, although more or less capable of being detached from it, and more or less capable of being used in such detached state, must also be considered as belonging to the heir. [BYLES, J.—That was the case of a steam-engine and machinery which *were essential to keep the mines clear of water. The judgment in that case contains many observations which are favourable to your argument. I observe that both Lord Brougham (p. 325) and Lord Cottenham (p. 329) speak with disapprobation of the cider-mill case, Lawton *v.* Lawton, 3 Atk. 13, which is referred to in Elwes *v.* Mawe.] The rule as between mortgagor and mortgagee is the same as between heir and executor: 2 Smith's Leading Cases, 158, 159. In Place *v.* Fagg, 4 M. & R. 277, it was held that by a mortgage of a mill, the stones, tackling, and implements necessary for the working of the mill pass to the mortgagee. Longstaff *v.* Meagoe, 2 Ad. & E. 167 (E. C. L. R. vol. 29), 4 N. & M. 211 (E. C. L. R. vol. 30), is to the same effect. In Ex parte Broadwood, In re Forbes M'Neill, 1 Mont. D. & De G. 631, it was held that an equitable mortgage of leasehold premises will carry all the fixtures, although erected for the purpose of trade, and therefore removable as between landlord and tenant, and although they are not specified in the lease deposited, or the memorandum of deposit. Sir John Cross there says: "In Ex parte Lloyd, In re Ogden, 3 Deac. & C. 765, this court held that an equitable mortgage of a cotton-mill carried all the fixtures, although they were erected for the purposes of trade, and the mortgagor continued in possession of them at the time of his bankruptcy. It has always seemed to me that the circumstance of fixtures being what are called trade-fixtures, is of importance only in questions depending between landlord and tenant, and does not affect the consideration of those arising between a mortgagor and mortgagee. Much confusion has, in my opinion, been created in the conflicting cases on this subject, by not attending to this distinction." The like was held in Ex parte Reynal, In re Gye and Hughes, 2 Mont. D. & De G. 443, where Mr. Commissioner Holroyd prefaces a very learned and elaborate *review of the authorities by these observations,—"I have always considered that personal chattels fixed to the freehold become parcel of the freehold; but, if fixed by a person having a particular interest in the freehold as a termor, and capable of removal without injuring the freehold, the termor may disunite them. A mortgagor in possession has, in my opinion, no such interest in the premises as will enable him to exercise this right of a tenant for years. He only holds possession of the land by the permission of the mortgagee, who may by ejectment, without giving any notice, recover against him. In this respect, it is said, the estate of a mortgagor is inferior to that of a tenant at will. Although judges have

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found it difficult to describe in proper terms the relation of mortgagor in possession and mortgagee, yet I think it clear from all the cases that a mortgagee, who merely receives his interest from the mortgagor in possession, may at any time eject the mortgagor, and that such mortgagor can do nothing to prejudice the mortgagee, without his consent." So, in Ex parte Bentley, In re West, 2 Mont. D. & De G. 591, a lessee erected trade fixtures (coke-ovens), firmly attached to the freehold, but removable as between himself and the landlord. He then mortgaged the premises by way of demise, by the same description as that in the lease, and without referring to the new erections, the sum secured being a floating balance, limited to an amount greater than the premises would be worth without the fixtures, and became bankrupt: and it was held that the mortgagee was entitled to the fixtures. Again, in Ex parte Price, In re Stead, 2 Mont. D. & De G. 518, a memorandum of deposit accompanying an equitable mortgage stated that the bankrupt had deposited "the deeds and documents under which I hold the steam-mills, cottages, land, buildings, and premises at L.:" and it was held *126] *that the equitable mortgagee had a lien on the fixtures, whether erected before or after the time of the deposit, and including those that were removable as between landlord and tenant. Ex parte Belcher, In re Maberly, 2 Mont. & Ayr. 160, is to the same effect. The Chief Judge there says: "All the cases decide, that, where fixtures are attached by the landlord, they become part of the freehold:" Hubbard *v.* Bagshaw, 4 Sim. 326. And see Ex parte Cotton, In re Nutter, 2 M. D. & De G. 725.(*a*) Mather *v.* Fraser, 2 Kay & J. 536, was the case of a mortgage by two described in the deed as copper-roller manufacturers, reciting a conveyance to them of land and mills or factories in a manufacturing town, as tenants in common in fee, and that they were carrying on business at the said mills or factories as copper-roller manufacturers, and in such capacity had lately affixed to or placed upon the land, mills, or factories a steam-engine and boilers, together with a large quantity of mill-gear and millright work, and granting the land, mills, or factories, and hereditaments comprised in the recited conveyance, to the use of the plaintiffs in fee, subject to a proviso for redemption: and it was held, as between the plaintiffs and the mortgagor's assignees in bankruptcy, that, assuming it possible to *127] distinguish between the case of machinery *placed upon land for the purpose of trade or manufacture as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the purpose of better and more profitably enjoying the land (as to which, *quære?*), the recitals showed that this was a case of the latter description; and although the means of the proposed use and enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil,

(*a*) In this case the affidavits stated "that the steam-engine, boiler, and other machinery were fixed to the brick and timber work of the premises merely by bolts and screws, and that they could therefore be easily removed, without any damage to the buildings to which they were affixed In pronouncing his decision, Sir John Cross is reported to have made use of the following expressions,—"It has been said that the steam-engine is a locomotive piece of machinery, and may be easily removed. But I see no reason why a steam-engine should be more removable on the ground of its locomotion, than a door, or a window, which are also locomotive!"

and would have descended to the heir along with and as part of the soil itself. In giving judgment, Vice-Chancellor Page Wood, referring to Fisher *v.* Dixon, 12 Clark & Fin. 312, says,—"It is well expressed in that case, that the principle upon which the old rule of law, that fixtures pass with the soil, was relaxed in favour of trade, has no application where, as here, the parties who affixed the machinery were themselves the owners in fee of the soil. According to the old rule of law, if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade; it being very early perceived that it would be injurious to trade if a tenant were told that he must contrive to conduct his trade with property which need not be fixed in any way to the soil, or he would at once be held to have made a present of it to his landlord; and, accordingly, as between landlord and tenant, questions of some difficulty have arisen whether, in particular instances, chattels pass with the freehold of the land. But here,—and it was the case also, as Lord Cottenham observed, in Fisher *v.* Dixon,—no such question can arise. Here, the same *parties were owners both of the fee and of the [*128 chattels in question. There was no landlord between whom and themselves the question could arise. In the exercise of their own discretion as to the disposition of the property, they fixed certain articles to the soil, and no question of encouragement to trade can arise. Here, therefore, and in all other cases where the owner of the chattel is also the owner of the fee, the court can at once dismiss from its consideration the entire class of cases in which the rule of law has been relaxed in favour of trade, all such cases presuming the existence of the relation of landlord and tenant. This consideration disposes of the decision,—I do not say, of the dictum,—in Hellawell *v.* Eastwood. For the decision in that case there was abundant ground, irrespective of the dictum. The tenant had annexed to the freehold property which, as between him and his landlord, would have been held, on the determination of the lease, to be chattel property which the tenant was entitled to remove. The landlord sought to distrain. There would have been a manifest inconsistency in holding such property exempt from distress, on the ground of its being annexed to the freehold, when, at the expiration of the lease, the court must have held the very same property to belong to the tenant, notwithstanding such annexation. That case, therefore, in common with the numerous other cases upon the question of distress, has no application to the present. And, in fact, the only point for which it was cited, was, the dictum of a learned judge, whose opinion is entitled to great weight, Mr. Baron Parke, who there makes this remark,—'The machines would have passed to the executor; per Lord Lyndhurst, C. B., in Trappes *v.* Harter. They would not have passed by a conveyance or demise of the will.' He takes those two points. 'They never ceased to have the character of movable *chattels, [*129 and were therefore liable to the defendant's distress.' That remark, however, is a mere dictum, not necessary to account for the decision, for which there was abundant ground in the circumstances I have mentioned: and I cannot but think that the numerous class of cases, ending with that of Fisher *v.* Dixon, which does not appear to

have been cited in Hellawell *v.* Eastwood, could not have been present to the mind of the learned judge to whom that dictum is attributed." [WILLES, J., referred to Dalton *v.* Whittem, 3 Q. B. 961 (E. C. L. R. vol. 43). CROWDER, J.—Simson *v.* Harcourt, 4 T. R. 568 (Simpson *v.* Hartopp, Willes 512), and Darby *v.* Harris, 1 Q. B. 895 (E. C. L. R. vol. 41), are conclusive to show that fixtures which a tenant may sever from the freehold and take away during his term, are not therefore distrainable for rent. That seems to have escaped the Vice-Chancellor when commenting on Hellawell *v.* Eastwood.] The case of Hellawell *v.* Eastwood lays down no new rule of law. The court there came to the conclusion that the things distrained were not fixtures. Parke, B., founds his dictum in Hellawell *v.* Eastwood upon Trappes *v.* Harter; and Trappes *v.* Harter is founded upon Lawton *v.* Lawton, 3 Atk. 13, and Lord Dudley *v.* Lord Ward, Ambler 113, neither of which are now considered to be law. It is submitted, that, upon principle, as well as upon authority, the articles in question are clearly fixtures, as between the mortgagor and mortgagee, and passed to the latter.

Cur. adv. vult.

CROWDER, J., now delivered the judgment of the court:—

This was an action by the assignees of a bankrupt, to recover from the defendant certain articles alleged to be part of the bankrupt's estate.

*130] It was tried *before my Brother Byles at the last Spring Assizes at Liverpool, when a verdict was found for the plaintiff, with liberty to move to enter a verdict for the defendant.

The facts were these:—Moore, the bankrupt, being the owner of a vacant plot of ground, in 1853 mortgaged it in fee to one Oswald, who, in August, 1858, sold to the defendant the mortgaged premises. Moore became bankrupt in September, 1858. Subsequently to the mortgage, and before the sale in 1858, Moore, who had always continued in possession, erected various buildings upon the plot of ground, and set up all the articles sought to be recovered in this action. They consisted of a steam-engine and boiler used for the purpose of supplying with sea-water the baths which had been erected on the premises; also a hay-cutter and malt-mill or corn-crusher, and grinding-stones, all (except the grinding-stones) being screwed with bolts and nuts, or otherwise firmly affixed to the several buildings to which they were attached, but still in such a manner as to be removable without damage to the buildings or to the things themselves. The upper mill-stone lay in the usual way upon the lower grinding-stone. All these fixtures were put up for the purposes of trade.

The rule was argued before my Brother Willes and Byles and myself; and, in the course of the argument a great many cases were cited, which we desired time to consider before delivering our judgment.

On the part of the plaintiffs it was contended,—first, that the articles in question were not fixtures at all, because not permanently attached to the freehold, but simply movable chattels, which therefore passed to the assignees of the bankrupt,—or, secondly, that, if fixtures, they were trade fixtures, and therefore removable by the bankrupt, and so would pass to his assignees.

*131] The case of Hellawell *v.* Eastwood, 6 Exch. 295,† was *cited in support of the first proposition. There, cotton-spinning machines called mules had been distrained for rent; and the question was as to

the validity of the distress. It appeared that these mules were fixed by means of screws, some into the wooden floor, some into lead which had been poured in a melted state into holes in stone for the purpose of receiving the screws: and it was considered by the Court of Exchequer as a question of fact whether the machines so fixed were parcel of the freehold. It was said, that, whether a chattel attached to the soil was a fixture was always a question of fact, depending upon the circumstances of each case, and principally on two considerations,—first, the mode of annexation to the soil or fabric of the building, and whether it could be easily removed, without injury to itself or the building,—and, secondly, the object of the annexation, whether for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, and the more complete enjoyment and use of it as a chattel. The judgment of the court proceeded upon both considerations. They said that the mules never became part of the freehold, as they were only attached slightly, and could be easily removed without any damage; "and the object and purpose of the annexation was not to improve the inheritance, but merely to render the machinery steadier and more capable of convenient use as chattels."

Now, without expressing any opinion upon that case, it is sufficient on the present occasion to observe, that, assuming it to be well decided, it is no authority for holding that the disputed articles in the case at Bar are not fixtures forming part of the freehold; for, we are of opinion, as a matter of fact, that they were all firmly annexed to the freehold for the purpose of improving the inheritance, and not for any temporary purpose. The bankrupt was the real owner of the *premises, [*132
subject only to a mortgage, which vested the legal title in the mortgagee until the repayment of the money borrowed. The mortgagor first erected baths, stables, and a coach-house, and other buildings, and then supplied them with the fixtures in question for their permanent improvement. As to the steam-engine and boiler, they were necessary for the use of the baths. The hay-cutter was fixed into a building adjoining the stable, as an important adjunct to it, and to improve its usefulness as a stable. The malt-mill and grinding-stones were also permanent erections, intended by the owner to add to the value of the premises. They, therefore, resemble in no particular (except being fixed to the building by screws) the "mules" put up by the tenant in the case of Hellawell *v.* Eastwood, 6 Exch. 295.†

But, secondly, it was contended on the part of the plaintiffs, that, assuming the articles in question to have been so affixed as not to be removable according to the general rule of law, yet that, as they were trade fixtures, they might be removed, and so would pass to the bankrupt's assignees.

The whole of the plaintiff's argument upon this head was founded upon the well-established exception to the general rule, that, where a tenant puts up fixtures for the purpose of trade during his term, he may before its expiration, without the consent of his landlord, disunite them from the freehold. The defendant's counsel were quite ready to admit the validity of the numerous authorities supporting that proposition, and to concede to the plaintiff, that, if the bankrupt had been tenant to the mortgagee for a term, and the bankruptcy had happened before its expiration, the fixtures in question were such as would hav

passed to the assignees. But they denied that any such tenancy existed
*133] in the present case. And this leads us *to the consideration of the peculiar relationship existing between a mortgagor in possession and the mortgagee,—which it is really difficult to express in any other legal terms. A mortgagor in possession has been called sometimes a tenant at will to the mortgagee, or a tenant at sufferance, or *like* a tenant at will: but he has never been designated as tenant for any term. Lord Ellenborough, in Thunder d. Weaver *v.* Belcher, 3 East 449, called him a tenant at sufferance; and Lord Tenterden, in Doe d. Robey *v.* Maisey, 8 B. & C. 767 (E. C. L. R. vol. 15), 3 M. & R. 107, said,—"The mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee." He is clearly not a tenant at will, because he may be ejected without any notice or demand of possession, and is not entitled to the growing crops.

All the cases, therefore, which show, that, where a tenant for years has put up trade-fixtures, he may remove them before his tenancy expires, have no application to the case at Bar. But, two cases of mortgagee and mortgagor in possession were cited by the plaintiffs' counsel as strongly supporting their clients' title to the verdict. One was, Trappes *v.* Harter, 2 C. & M. 177,† decided by the Court of Exchequer, in which Lord Lyndhurst delivered the judgment of the Court: and the other was, Waterfall *v.* Peningstone, 6 Ellis & B. 876 (E. C. L. R. vol. 88), in which our present Chief Justice, then Mr. Justice Erle, delivered the judgment of the Court of Queen's Bench.

Trappes *v.* Harter was a decision in favour of the assignees of a bankrupt mortgagor in possession, upon the ground that the mortgage did not pass the fixtures in question, and was not intended by the parties to
*134] pass them. The mortgage enumerated various fixtures, *but did not refer to the fixtures in dispute; and this omission, together with other circumstances in the case, induced the court to be of opinion that they were intentionally omitted in the mortgage-deed, and therefore did not pass by it. That case, then, "must be regarded as having been decided on its own peculiar circumstances," as stated in the note appended to it, and cannot be taken as an authority to govern us in the case before us. The other case, of Waterfall *v.* Peningstone, was also that of a bankrupt mortgagor in possession and a mortgagee, where the question was, whether the bill of sale of the fixed machinery, drawn in the shape of a mortgage, required registration under the 17 & 18 Vict. c. 36. This partly involved the consideration as to whether the fixtures were to be deemed goods and chattels within that act: and Hellawell *v.* Eastwood was cited in the argument, and recognised as a valid authority by the court. But the species of mortgage was of a peculiar description. There had been a prior mortgage of the premises with the fixtures then thereon. Afterwards, for a further consideration, a mortgage was made of the fixtures which had been subsequently annexed, by themselves: and the court was of opinion that they did not pass by the prior mortgage, "because the tenor of the instrument shows that the parties did not so intend:" and they held that the separate mortgage of these fixtures was within the 17 & 18 Vict. c. 36, requiring the deed to be registered; and, for want of such registration, they decided that the fixtures

passed to the assignees. In the present case, however, there do not appear any circumstances tending to show an intention existing between Moore, the bankrupt, and his mortgagee, that the fixtures annexed subsequently to the date of the mortgage should not become part of the mortgaged estate: and, in the absence of such intention, the current of *authorities in the bankruptcy court shows that such an annexation of fixtures would enure to the benefit of the mortgagee. [*135

In Ex parte Belcher, 4 Deac. & Ch. 703, which was decided in the Court of Review, in 1835, it was held that fixtures annexed to the freehold after the mortgage by the mortgagor in possession, and which, as between landlord and tenant, would have been removable if put up by the tenant, became part of the freehold, and did not pass to the assignees of the bankrupt mortgagor. The Chief Judge (afterwards Mr. Justice Erskine) there says,—after adverting to the relaxation of the general rule of law in favour of trade-fixtures put up by the tenant,—"But that is not the present case. Again, it is said that the property in question did not pass by the mortgage-deed. Now, it always appeared to me, that, where the owner of the inheritance affixes property to it, it becomes a fixture in the general sense of the term, and part of the freehold; and, if the inheritance be afterwards sold or let, it goes with the freehold: and I confess I see no distinction, for this purpose, whether the deed be one of absolute conveyance, lease, or mortgage. A mortgage, therefore, made by the owner of the inheritance, will, without naming them, pass all the fixtures thereon." And, in another part of his judgment, he says: "Again, it is urged, that, as to those articles which were attached after the execution of the mortgage-deed, they could not pass to the mortgagee. But there has not been cited any authority, or even dictum, for such a proposition. I confess I know no case which goes so far as to determine, or even to intimate an opinion, that, where a mortgagor in possession alters the premises by addition or otherwise, the mortgagee shall not take the benefit of such alteration. I can find no distinction, therefore, substantially, between *those which were affixed *before* and those affixed *after* the date of the mortgage-deed. In that [*136 point of view also, I am of opinion that all the fixtures alike passed to the mortgagee." There is also a very elaborate and learned judgment of Mr. Commissioner Holroyd, reported in 2 Mont. D. & De G. 443 (1841), in which the whole subject is fully considered, and a similar opinion very clearly expressed. To the same purport are the decisions in the Court of Review, Ex parte Broadward, 1 Mont. D. & De G. 631 (1841), Ex parte Price, 2 Mont. D. & De G. 518 (1842), Ex parte Bentley, 2 Mont. D. & De G. 591 (1842), Ex parte Cotton, 2 Mont. D. & De G. 725 (1842), and Ex parte Tagart, 1 De Gex 351 (1847).

The effect of annexing fixtures of a similar character to those in the present case by the owner of the inheritance, was much discussed in the House of Lords, in the Scotch case of Fisher *v.* Dixon, 12 Clark & Fin. 312. There, the question was considered as if arising between the heir and executors: and Lords Brougham, Cottenham, and Campbell delivered very decisive opinions in favour of the heir. The subject-matter of the annexation in that case was, steam-engines and machinery for the purpose of working an iron mine. Lord Cottenham, after having dismissed as wholly inapplicable the cases of landlord and tenant, says: "Then, the case being simply this, the absolute owner of the land

having erected upon and affixed to the freehold, and used for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land and take away all the machinery necessary for the enjoyment of the land?" He answers,—"Although machinery is generally in its nature personal property, yet, with regard to machinery or a
*137] manufactory erected upon the *freehold for the enjoyment of the freehold, nobody can suppose *that* can be the rule of law: and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself." In Mather *v.* Fraser, 2 Kay & J. 536, which was a case of bankrupt mortgagor in possession decided by Vice-Chancellor Wood in 1856, Fisher *v.* Dixon was, amongst numerous other cases, cited before the Vice-Chancellor. In giving judgment, the Vice-Chancellor says: "They (the mortgagors) conceived that the most profitable purpose for which they could use the land would be the business of copper-roller manufacturers. I apprehend, therefore, that the case comes clearly within that of machinery affixed to land by the owner of the land for the purpose of better and more beneficially using and enjoying the land of which he is the owner; and, although the means of such use and enjoyment be manufacture or trade, still I am of opinion that all such of the articles in question as are affixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, are within the authority of Fisher *v.* Dixon, partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself. These later decisions are in accordance with the earlier cases of Wynn *v.* Ingleby, 5 B. & Ald. 625 (E. C. L. R. vol. 7), Colegrave *v.* Dias Santos, 2 B. & C. 76 (E. C. L. R. vol. 9), 3 D. & R. 255 (E. C. L. R. vol. 16), and The King *v.* The Inhabitants of St. Dunstan's, 4 B. & C. 686 (E. C. L. R. vol. 10), 7 D. & R. 178 (E. C. L. R. vol. 16), and Place *v.* Fagg, 4 M. & R. 277.

In Wynn *v.* Ingleby, it was held, that certain articles, consisting of set-pots, ovens, and ranges fixed up by the owner of a house, would go to the heir and not to the executor, and could not therefore be seized
*138] under a fi. fa. against the owner. In Colegrave *v.* Dias Santos, *in which there was a question whether stoves, closets, shelves, brewing vessels, locks, blinds, &c., passed to the purchaser of a house, upon a sale and conveyance of the house,—the court said that some of the articles, viz. the stoves, cooking-coppers, mash-tubs, water-tubs, and blinds, might be removable as between landlord and tenant, but would not belong to the executor, but to the heir, and were, as between those persons, parcel of the freehold. In The King *v.* The Inhabitants of St. Dunstan's, Mr. Justice Bayley said that stoves, grates, and cupboards were parcel of the freehold, and though they might be removed by a tenant during his term, yet they would go to the heir, and not to the executor. And in Place *v.* Fagg, the property in question was the stones, tackling, and implements necessary for the working of a mill. There had been a mortgage of the mill; and it was held, that, by that mortgage, the stones, tackling, and implements necessary to the working of the mill passed to the mortgagee.

And we may observe here, in reference to a point made by one of

the learned counsel for the plaintiff, that at all events the verdict must be for the plaintiff for the upper mill-stone, that Liford's Case, 11 Co. Rep. 50, citing Wyston's Case, 14 H. 8, fo. 25 b, disposes of that point. The law is correctly stated in Amos on Fixtures, p. 257, where, in speaking of things constructively annexed to the freehold, he mentions a mill-stone, "which, though not annexed to the freehold, is yet essentially parcel of the mill."

We think, therefore, that, when the mortgagor (who was the real owner of the inheritance), after the date of the mortgage, annexed the fixtures in question for a permanent purpose, and for the better enjoyment of his estate, he thereby made them part of the freehold which had been vested by the mortgage-deed in *the mortgagee; and that, consequently, the plaintiffs, who are assignees of the mortgagor, cannot maintain the present action. [*139

The verdict, therefore, must be entered for the defendant.

Rule absolute.(a)

(a) On a subsequent day, it was intimated by the court that Mr. Justice Willes entertained serious doubts as to whether the articles in question were not chattels.

See the American notes to Elwes *v.* Mawe, 2 Smith's Lead. Cases 99, where the subject of fixtures will be found discussed.

MORRIS *v.* BARRETT. *Nov.* 15.

By a judge's order the debt and costs were to be paid by instalments of 2*l.* on the 25th of each month. The 25th happening to be a Sunday, the instalment was offered on Monday, and refused, and judgment was signed on the following day:—The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money.

THIS cause having been referred, and 34*l.* having been found due from the defendant to the plaintiff, on the 25th of May last a judge's order was made in the following terms:—

"Upon hearing the attorneys or agents on both sides, and by consent, I order, that, upon payment of 34*l.*, the debt and costs as agreed, in manner following, viz. 2*l.* on the 28th of May instant, 2*l.* on the 25th of June next, and 2*l.* on the 25th of every succeeding month until the whole is paid, all further proceedings in this cause be stayed: And I further order, that, in case default be made in any or either payment as aforesaid, the plaintiff be at liberty to sign final judgment for the said sum of 34*l.*, and issue execution for the amount unpaid, with costs of judgment, execution, &c."

The first and two following instalments were duly paid. The 25th of October, the day on which the fourth instalment became payable, being a Sunday, the defendant called at the office of the plaintiff's attorney on Monday the 26th, and offered to pay it, but was told *he was too late, and that judgment had been signed. No judgment, however, was signed until the following morning. [*140

The defendant took out a summons to set aside the judgment, on the ground that under the circumstances he had the whole of Monday to pay the money, and that the judgment signed after the money was

offered was irregular. The summons came on before Byles, J., at Chambers, who referred the matter to the court.

Holl now moved accordingly.—The offer of the money on the Monday was in sufficient time. The case of money payable under a judge's order differs from the ordinary case of a contract between the parties for the payment of a sum on a given day. There is no case precisely in point; but there are several which show that an act of the court is not to be intended to be done on the Lord's day. Thus, Sunday being the last of the four days for putting in bail, it was held that an assignment of bail taken on the Monday was premature: Anonymous, 1 Stra. 86; Studley *v.* Sturt, 1 Stra. 782; Bullock *v.* Lincoln, 1 Stra. 914. So, where by an award money is ordered to be paid on a Sunday, the party will not be attached if he pays it on the following day: Hobdell *v.* Miller, 6 N. C. 292 (E. C. L. R. vol. 37), 2 Scott N. R. 163, 165. [ERLE, J.—Generally, in all matters of procedure, if the last day falls on a Sunday, the party has the whole of Monday to do the act.] The court will always act upon that general rule in matters relating to its own process. This is not like the case of a bill of exchange, which, by the law of merchants, falling due on the Sunday is payable on Saturday: Tassell *v.* Lewis, 1 Ld. Raym. 743. In Rowberry *v.* Morgan, 9 Exch. 730,† where the plaintiff was held to be entitled to sign judgment and issue execution on a specially endorsed writ under the 27th section of
*141] the Common *Law Procedure Act, 1852 (15 & 16 Vict. c. 76), on Monday, the Sunday being the last day for appearance, the decision turned upon the precise language of the statute. [CROWDER, J.—Upon the same principle, we lately held in this court in a case of Peacock, app., The Queen, resp., 4 C. B. N. S. 264 (E. C. L. R. vol. 93), that Sunday is to be computed in the three days allowed for an application to justices to state a case for the opinion of one of the superior courts under the 20 & 21 Vict. c. 43, s. 2, although it be the last day.]

Barnard showed cause in the first instance.—Whenever a person contracts to do an act on a Sunday, the doing of which on that day is not prohibited by any statute, as the exercise of his ordinary calling, or unless it be in a judicial proceeding, such as the service of a writ or other process, or a matter regulated by custom, as the payment of a bill of exchange, he is not excused from the performance of his contract by the accident of the day being Sunday. A contract is not the less a valid contract because it is embodied in a judge's order,—Hookpayton *v.* Bussell, 10 Exch. 24;† or, as was said by Parke, J., in Wentworth *v.* Bullen, 9 B. & C. 840, 850 (E. C. L. R. vol. 17), "The contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a judge." In Rawlins, app., The Overseers of West Derby, resp., 2 C. B. 72 (E. C. L. R. vol. 52), 1 Lutw. Reg. Cas. 373, it was held, that, when the 20th of July falls on a Sunday, the service of a notice of claim on an overseer, under the 6 & 7 Vict. c. 18, s. 4, by leaving it at his place of abode on that day, is good service. A fair may legally be held on a
*142] Sunday.(a) So, a contract of hiring made on a *Sunday between a farmer and a labourer, for a year, is valid; and a service under

(a) "By the stat. 27 H. 6, c. 5, a fair or market shall not be held upon principal feasts, Sundays, or Good Friday (four Sundays in harvest excepted), upon forfeiture of all goods sold to

it confers a settlement: The King *v.* Whitnash, 7 B. & C. 596 (E. C. L. R. vol. 14), 1 M. & R. 452 (E. C. L. R. vol. 17). And, generally speaking, all contracts which are not within the 29 Car. 2, c. 7, must be performed on the Sunday, if so provided. In Hobdell *v.* Miller, the court might well refuse to grant an attachment for non-payment of money pursuant to an award on Sunday, provided the money was tendered on the Monday, and the party to whom the money was to be paid sustained no damage. [ERLE, J.—If money be payable on Monday, may not the debtor tender the amount, with nominal damages, on Tuesday? Would not that be a good plea in bar?] There was no regular tender here on the Monday. The judgment is regular, and there is no ground for setting it aside.

Holl, in support of his rule, was stopped by the court.

ERLE, C. J.—I am of opinion that this rule must be made absolute. I desire not to be understood as giving any decision as to the rights of parties under a contract: but, in arriving at the conclusion I come to, I seek only to give effect to the duty which the law imposes upon a party who is directed by a judge's order *to pay money. Here, [*143
the proceedings were stayed on condition of the defendant's paying 2*l.* on the 25th of every month. The fourth instalment became due on the 25th of October. That day happened to be a Sunday. The defendant was ready and offered to pay it on the Monday; but the plaintiff, conceiving that the offer came too late, declined to receive it, and on the following day signed judgment for the balance due. Confining myself to the judge's order and the remedy and duty thereon, and to what ought to be the fair meaning and understanding of the instrument, I find no authority for saying that the defendant was bound to search for his creditor and pay him the money on the Sunday. The statute of Charles and the cases upon it do not apply. But I think there is abundance of analogy to be found in the provisions of the Common Law Procedure Act and in the general practice of the courts, under which, when the last of a given number of days for the doing of an act falls on a Sunday, as a general rule the party has the whole of Monday to do it in. I therefore think that the defendant in the present case well enough performed his duty by being ready to pay the money on the Monday, and consequently that the judgment, which was unauthorized by the order, should be set aside.

CROWDER, J.(*a*)—I am of the same opinion. It seems to me that the reasonable construction of the judge's order is, that the defendant was not bound to pay the instalment on the Sunday. If it had been present to the mind of the learned judge who made the order that the 25th would happen to be a Sunday, he certainly would not have made the order for the payment of it on that day. I think the defendant did all he was bound to do by offering the money on the Monday; and that it *was very sharp practice to sign judgment. This is not [*144
like the case of an ordinary contract; and I desire not to be

the lord of the franchise. And he that has no day for it but only such festival days, shall hold his fair or market within three days before or after, proclamation being first made; and he that has other days sufficient shall hold it the full number of days allotted for his market or fair, such festival days, &c., excepted. But a prescription to hold a fair 29th September is good, though it may be a Sunday; for, a fair upon that day is not void, though the goods then sold shall be forfeited by the stat 27 H. 6, c. 5: Comyns *v.* Boyer, Cro. Eliz. 485.

(*a*) Williams, J., was engaged in the Divorce Court.

understood as at all interfering with any of the cases which have been referred to with reference to contracts. The cases upon the construction of statutes are also founded upon an entirely different consideration. In short, none of the authorities cited by Mr. *Barnard* in any degree support his argument. It seems to me that the reasonable construction of the judge's order, and that which must have been the intention of the learned judge, is, that, if the day named for making the payment should happen on a Sunday, it should be considered a sufficient compliance with the order if the money was paid on the following day.

BYLES, J.—I am entirely of the same opinion. I abstain from expressing any opinion beyond what the necessity of the case calls for. This is not a case in which we are called upon to construe a statute or a mercantile usage, or an ordinary contract. But the question is, what is the reasonable construction of a judge's order for the payment of instalments of money on given days. I think, that, if one of those days falls on a Sunday, there is no rule of law and no principle which calls upon us to hold that it must be paid on that day or on the day before. It follows, therefore, as a necessary consequence, that a payment on the day after is in time.

Holl asked for costs.

ERLE, C. J.—This being entirely res nova, I do not think the plaintiff should be visited with costs. Rule absolute, without costs.

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*145] *DINGLE v. HARE. *Nov.* 15.

In an action for a breach of warranty on the sale of goods which the buyer has sold again,—Held, that the proper measure of damages was, the difference between the real market value at the time of the sale and the contract price.

Quære, whether the buyer might not have been entitled to recover a sum fairly and reasonably paid by him as compensation to a third person to whom he had upon the faith of the defendant's warranty sold a portion of the goods?

THIS was an action for a breach of warranty on a sale of goods.

The declaration stated that, on the first of February, 1857, the defendant agreed to sell and sold to the plaintiff, and the plaintiff, at the request of the defendant, bargained for and agreed to buy and bought of the defendant 20 tons of superphosphates, guaranteed by the defendant to contain 30 per cent. of phosphate of lime, at the price of 5*l.* 5*s.* per ton, free on board, payment to be made by the plaintiff's acceptance at three months' date, or in cash on delivery, less 1*l.* 5*s.* per cent.; and that, although the defendant delivered to the plaintiff certain superphosphates as and being the article so bargained for as aforesaid, yet the said superphosphates did not contain 30 per cent. of phosphate of lime, but only a far smaller proportion thereof, whereby the same was of much less value to the plaintiff than it would otherwise have been: Averment, that the plaintiff, relying on the due fulfilment of the said bargain by the defendant, and not knowing that the said superphosphates did not contain 30 per cent. of phosphate of lime, and believing, and having reason to believe the contrary, resold a portion thereof to one Joseph Robins as and being such superphosphates con-

taining 30 per cent. of phosphate of lime, and that, afterwards, and before the commencement of this action, the plaintiff was compelled, by reason of the premises, to compensate the said Joseph Robins for and in respect of the said deficiency of phosphate of lime in the said superphosphates so sold to him as aforesaid.

The defendant pleaded,—that he did not contract *with the plaintiff as alleged,—secondly, that the said superphosphates [*146 delivered by the defendant to the plaintiff as in the declaration mentioned did contain 30 per cent. of phosphate of lime, according to the said contract. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Easter Term. The facts were as follows:—The plaintiff and defendant were both dealers in artificial manures—the former in Cornwall, the latter in London. In the year 1856, the plaintiff contracted with one Wilson, who was a commission agent, travelling about the country selling artificial manures, and who acted in that capacity for the defendant and also for a company called "The Blood-Manure Company," for the purchase of a quantity of blood-manure. Finding the quality of this article not satisfactory, the plaintiff complained to Wilson, and expressed a desire to be released from his contract, whereupon Wilson wrote to him, as follows:—

"February 4th, 1857.

"Mr. J. H. Dingle.

"Dear Sir,—In reply to your favour of the 2d instant, I can only refer you to my previous letters: but I cannot understand how it is that you are the whole and single exception in complaining of the blood-manure. I am confident there must be some mistake in the matter, or it has not been properly applied. However, as you do not want the manure, leave the matter with me, and I will try to get out of it for you. Will you take 20 tons superphosphates instead? Guaranty 30 per cent. phosphate of best quality, and just same as I sent you last year. As a matter of course, for my own sake, to secure your orders for another season, I should send you an article inferior to none, and which on trial you should find equal to Lawes's or any other. Now, this is truth. Price per ton 5*l.* 5*s.* free on board, three months' acceptance, or *cash less one and a quarter. I will, if I can, send [*147 you ten tons of bone phosphate to Plymouth, with Mr. Frehane's and Mr. Bishop's cargo: but I cannot promise you, as I said before, having so many parties wanting it, and being almost oversold. I shall try to manage it for you, however. We have no testimonials. I enclose average analysis, as you desire: and, awaiting your favours and commands, &c.

"G. H. WILSON."

The plaintiff replied to this letter, again desiring to be released from the contract as to the blood-manure, but saying nothing about the superphosphates, whereupon Wilson wrote him again, as follows:—

"February 10th, 1857.

"J. H. Dingle, Esq.

"Dear Sir,—By your letter you seem to entirely mistake me. I cannot release you from the blood-manure but on the terms named, viz., that I send you 20 tons superphosphates instead; and then I must

take and pay for the blood-manure myself, and sell it to another party if possible. To finish the matter, I have put you down for 20 tons of superphosphates (and so release you from the blood-manure) at 5*l.* 5*s.* per ton, free on board London. *The superphosphates will be* 30 *per cent. of lime*, same as the quality Mr. Bishop bought in London. The quality I showed you, containing 25 per cent. soluble, and 10 per cent. insoluble, was 5*l.* 10*s.* per ton free on board, and is now 5*l.* 15*s.* per ton free on board; and, if 100 tons were taken, the price would not be a fraction less. If I can, I will send you bone-manure or phosphate, or as much as I can, you may rely on; but, if you do not get any, do not be disappointed. You should secure such goods when you have a chance, in future.

"G. H. WILSON."

*148] *In reply to this letter, the plaintiff wrote to Wilson, accepting his offer; and, on the 16th of February, 1857, Wilson again wrote to him, as follows:—

'February 16th, 1857.

"J. H. Dingle, Esq.

"Dear Sir,—Your favour of the 12th has been forwarded to me, and reached me here; and, in accordance therewith, 20 tons of the superphosphate of lime, from my friends Messrs. Phillip Hare & Co., 36 Mark Lane, London, shall be sent you in lieu of the blood-manure. Also, all exertions shall be made to ship you 10 tons of the bone-phosphate with the cargo coming to Looe or Plymouth. I shall be happy to receive your promised orders for grease. Awaiting which, I am, &c.

"G. H. WILSON."

The plaintiff again wrote to Wilson, asking for an analysis of the manure sent, and accordingly an analysis was forwarded to him; but, as he could not understand it, he wrote for an explanation and for more particularity as to the amount of soluble phosphate the manure would contain. To this demand Wilson replied as follows:—

"March 4th, 1857.

"J. H. Dingle, Esq.

"Dear Sir,—In reply to yours of the 2d ult., you have the analysis of the superphosphates. *The soluble phosphate will be* 16 *to* 17 *per cent.* I repeat what I before said, I believe a better article was never sold in the county of Cornwall, either manufactured at Plymouth or elsewhere.

"G. H. WILSON."

In order to perform the contract thus made for him by Wilson, the defendant purchased twenty tons of superphosphates in the market *149] *unwarranted*, and *shipped them to the plaintiff, at the same time writing to him as follows:—

"36, Mark Lane, April 24th, 1857.

"J. H. Dingle, Esq.

"Dear Sir,—We have at last the pleasure to hand you bill of lading and invoice of the 20 tons superphosphate of lime shipped per Ann and Elizabeth, which sailed this morning. We also enclose draft for acceptance for the amount, which we shall feel obliged by your doing the needful with, and returning in course of post.

"PHILLIP HARE & Co."

The plaintiff accepted and duly paid the draft. On the arrival of the manure, it was found that ten tons of it consisted of a gray mixture, which turned out to be very good, and of ten tons of a black mixture. The plaintiff sold the whole 20 tons to different farmers, realizing a profit upon the sale of 30*s.* per ton. Of the black mixture he had sold 2 tons to one Robins, who used it on his farm; but finding it to be comparatively worthless, Robins applied to the plaintiff and threatened to sue him for compensation. Samples of the black mixture were found on analysis to contain only 7 or 8 per cent. of phosphate of lime, and to be worth no more than 2*l.* 2*s.* a ton. The plaintiff accordingly paid Robins 20*l.* The purchasers of the other 8 tons of the black mixture made no complaint. A correspondence ensued between the plaintiff and the defendant, in the course of which the latter denied Wilson's authority to warrant the manure.

The plaintiff thereupon brought this action to recover the difference between the value of the 10 tons of the black mixture and the price he had paid for it, and also the 20*l.* which he had been compelled to refund to Robins.

*On the part of the defendant it was insisted that he was not bound by the warranty given by Wilson; and that the transaction was so mixed up with the contract with the Blood-Manure Company that there was no consideration for the warranty as between the plaintiff and defendant, even assuming that Wilson had authority to warrant: and the defendant, who was called, stated that he had expressly desired Wilson not to warrant the article, as it was not warranted to him; and that it was not usual in the market to sell these manures with a warranty. Wilson was not called, nor was any reason assigned for his absence. [*150

The plaintiff's witnesses, on the other hand, swore that it was the invariable practice to warrant the quality of the article, and that no merchant bought manure without a warranty.

In his summing up the learned judge told the jury, that, if it was Wilson's practice to sell these articles with a warranty, and the defendant knew it, the mere fact of his having on the particular occasion forbidden him to warrant would not relieve him from the consequences. As to the damages, he told them, that, if the defendant knew that the plaintiff was a merchant dealing in these articles and buying for the purpose of selling them again, any loss he might sustain upon such resale, by reason of their bad quality or of a breach of warranty, might fairly be said to be a damage which was in the contemplation of the parties at the time of making the contract; that if they thought the settlement of Robins's claim was a fair and reasonable thing, the defendant was bound to make good the loss; and that, as to the 8 tons as to which the purchasers had made no complaint, and possibly might never make any, the plaintiff was yet entitled to claim compensation, and to recover reasonable damages in respect of their not being of a fair merchantable quality and according to the warranty.

*In answer to specific questions put to them by the learned judge, the jury found,—first, that there was in fact authority given by the defendant to Wilson to warrant,—secondly, that these manures ordinarily were sold with a warranty,—thirdly, that the ten tons of the black mixture did not correspond with the warranty,—fourthly, [*151

that they were merchantable, that is, of some value as manure, though not worth 5*l.* 5*s.* per ton. And they assessed the damages at 31*l.* 10*s.*,—being the difference between the value of those ten tons, viz. 2*l.* 2*s.* per ton, and the price paid for them.

O'Malley, Q. C., in Trinity Term last, obtained a rule nisi to enter a verdict for the defendant, or to reduce the damages by 20*l.*, on the grounds that there was no evidence in support of the first issue; that, upon the fair construction of the contract, it ought not to be held that Wilson had no authority to make the contract stated in the declaration; and that the damages were not warranted by the evidence.

Huddleston, Q. C., and *Prentice*, now showed cause.—The evidence justified the jury in finding that Wilson warranted the article in question, and that he had authority so to do. It was proved that no man will buy this sort of commodity without a warranty or an analysis. In Addison on Contracts, 4th edit. 633, the liability of the principal for a warranty given by his agent is thus stated,—"If the principal sends his horse by the hands of an agent to market to be sold, and the agent warrants the horse to be sound, the principal is liable to an action upon the warranty at the suit of the purchaser, although he gave no express authority to the agent to warrant the horse: Alexander *v.* Gibson, 2 Campb. 555; Helyear *v.* Hawke, 5 Esp. N. P. C. 71. It has been said, that, if the principal gives
*152] his agent *express orders not to warrant, and he nevertheless does warrant, the principal is not responsible on the warranty, because the agent was not acting within the scope of the authority given him. But it is impossible for the buyer to know whether the agent is or is not exceeding the private instructions of his principal; and it can hardly be contended that a principal is to be allowed to have the benefit of the warranty, and at the same time to say that his agent had no power to make it: Pothier, Traité des Obligations, No. 79. If, in consequence of the representation or warranty so made, he has obtained the price of a sound horse for an unsound horse; if he has obtained 60*l.* for an animal which is not worth 10*l.*, is it to be supposed for one moment that he can be permitted to keep the 50*l.* any more than if he had been the actual seller of the animal himself, and had made the warranty with his own mouth? It was his own fault, as Lord Holt has observed, to repose the trust in unworthy hands, and he shall not be allowed to derive a profit from the misconduct of his own servant, to the prejudice of the innocent purchaser. 'I very much doubt,' observes Lord Kenyon, C. J., 'the case alluded to by the defendant's counsel, of the servant warranting the horse against the direction of his master;(*a*) to such a case I think the maxim respondeat superior applies; and the principal has his remedy against his agent for his misconduct:' Fenn *v.* Harrison,
*153] 3 T. R. 757, 760; *Pickering *v.* Busk, 15 East 38. So, also, observes Lord Abinger (Cornfoot *v.* Fowke, 6 M. & W. 358, 381†), 'in the case of a servant employed to sell a horse, but expressly forbidden to warrant him sound, is it to be contended that the buyer, induced

(*a*) "If a servant selleth a horse with warranty, it is the sale and contract of the master, but it is not the warranty of the master unless the master giveth him authority to warrant it; for, a warranty is void which is not made and annexed to the contract; but there is the warranty of the servant, and the contract of the master. But, if the master do agree with it after, it shall be said that he did agree to it ab initio:" Per Dodderidge, J., in Seignior & Walmer's Case, Godb. 360.

by the warranty to give ten times the price which he would have given for an unsound horse, when he discovers the horse to be unsound is he not entitled to rescind the contract, and recover back the purchase-money from the principal?'" The arrangement between the plaintiff and Wilson as to the return of the blood-manure was totally distinct from the contract now in question. The proposal to rescind that contract might have operated as an inducement to the plaintiff to purchase the superphosphates; but it was no part of the consideration; and if it had been, it would have made no difference: it was not necessary for the plaintiff to show that the *whole* consideration was moving from him; it is enough that he has a separate interest in the contract in respect of which he sues,—Jones *v.* Robinson, 1 Exch. 454.† As to the damages,—The evidence was that the plaintiff was a dealer in artificial manures, buying for the purpose of selling again: and this was known to the plaintiff; for, there had been previous dealings between the parties through the agency of Wilson. The true rule is that laid down by the Court of Exchequer in Hadley *v.* Baxendale, 9 Exch. 341, 354,†—"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated." Here, the defendant must have reasonably contemplated that the plaintiff would incur damage from the resale of the article so warranted to him. The doctrine thus laid down in Hadley *v.* Baxendale has been recognised and acted upon in numerous cases: see Fletcher *v.* Tayleur, 17 C. B. 21 (E. C. L. R. vol. 84); Smeed *v.* Foord, 28 Law J., Q. B. 178. [CROWDER, J.—And Portman *v.* Middleton, 4 C. B. N. S. 322 (E. C. L. R. vol. 56).] The jury were satisfied that the 20*l.* paid to Robins was a fair and reasonable compensation for the damage he had sustained. They also found that there was a breach of warranty; and, the article delivered being proved to be worth only 2*l.* 2*s.* a ton, they might well think the plaintiff entitled to recover the difference between that sum and the price paid for the superphosphates on the faith of their being of the quality represented.

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O'Malley, Q. C., and *Lewis*, in support of the rule.—It may be that an agent employed to sell goods has authority to do all that is usually done by agents so employed, even to the extent of warranting the articles he sells. But here there was no evidence that Wilson had any authority express or implied to warrant: the defendant did not know of the contract at all until long after it was entered into; and there never was any communication between him and the plaintiff on the subject. The doctrine in Addison on Contracts as to the liability of a master for

*155] an unauthorized *warranty of a horse by a servant intrusted to sell it, has been long exploded. The distinction between a general and a particular agent is put by Lord Elden, C., in The Bank of Scotland v. Watson, 1 Dow, P. C. 40, 44,—"If," says his Lordship, "Justice Buller had a horse to sell, and thought he would be bound by the warranty of his servant, though desired not to warrant, he would have gone to the market himself to see his horse sold. But the judges appeared to have made a distinction between horse-dealers and others. If Tattersall sent his servant to sell, and the servant, contrary to his instructions, warranted, Tattersall might be bound; but another person (not a horse-dealer) would not be bound by the unauthorized warranty of either Tattersall or his servant, or of his own servant, he having only given a particular authority." The alleged warranty here is of a very special description, and is not one falling within the scope of the ordinary duty of an agent. The contract was not made on behalf of the defendant alone: but it was one in which the Blood-Manure Company had an interest. It could not be enforced in its entirety against the defendant, and therefore it cannot be such a contract as Wilson could be supposed to have authority to enter into on behalf of the defendant: and there is nothing to prevent a man from dealing with an agent as a principal, if he so pleases. There was no such recognition of the acts of Wilson as to bring the case within the principle as to subsequent ratification by a principal of the acts of his agent, as laid down by Bayley, J., in Saunderson v. Griffiths, 5 B. & C. 909, 912 (E. C. L. R. vol. 11), 8 D. & R. 643 (E. C. L. R. vol. 16), and by Parke, J., in Vere v. Ashby, 10 B. & C. 288, 298 (E. C. L. R. vol. 21). Then, as to the damages,—admitting the authority of Hadley v. Baxendale to the fullest extent; it is submitted that it has no application here. The contract was for 20 tons of superphosphates. A portion, consisting of

*156] 10 *tons, was admitted to be of unexceptionable quality; and no complaint has yet been made of 8 tons more. [BYLES, J.—Possibly the publicity given to this case may stir up other complainants.] Robins, to whom the plaintiff has sold two tons, makes a claim for compensation. There was no proof that the manure was warranted to him: all that was proved, is, that Robins complained of the quality, and the plaintiff paid him 20*l*. Surely that cannot be said to be a damage such as would naturally flow from the defendant's breach of contract, or such as could have been in the contemplation of the parties at the time of making the contract.

ERLE, C. J.—I am of opinion that this rule should be discharged. I think the letters of Wilson constituted a contract on behalf of the defendant to supply the 20 tons of superphosphates, and a separate contract on Wilson's own behalf, to take back the blood-manure and to deal with it on his own account. Nothing can be clearer to my mind than that Wilson intended to bind himself personally as to the blood-manure. That being so, the material question to be considered, is whether Wilson had authority from the defendant to guarantee "30 per cent. phosphate of best quality,"—that is, whether he had authority to warrant the superphosphates to contain 30 per cent. of phosphate of lime. The strong presumption is, that, when a principal authorizes an agent to sell goods for him, he authorizes him to give all such warranties as are usually given in the particular trade or business: and here the jury

have found that the warranty was one which was usually given in this particular trade. Besides that, there was abundant evidence of authority to warrant, to go to the jury. The order having been communicated to the defendant, the latter goes into the market to procure the means of executing it. *Some* *of the terms of the bargain were certainly communicated by Wilson to the defendant,—the terms of payment for instance: and the probability is that *all* had. And it is not unworthy of remark, that Wilson, who made the contract, was not called. There was abundant evidence for the jury; and I see no ground for quarrelling with the conclusion they came to. As to the damages, the question argued before us was, whether, in estimating the damages the plaintiff was entitled to receive for the defendant's breach of warranty, the jury might take into consideration the compensation paid by the plaintiff to Robins, and the possible future claims of the other persons to whom the plaintiff had sold the inferior article. The general principle is, that a vendee of goods is responsible for the damages resulting as the natural and ordinary consequence of his breach of contract, by supplying an inferior article. The person with whom he contracts, relying upon the thing being as represented, sells it with a like representation, and thereby incurs a liability to his vendee whom he has through the fraud of the original seller misled. And every one knows the injury done to the character of a merchant in the eyes of his customers by a transaction of this sort. If, relying upon Wilson's guarantee that the article in question contained 30 per cent. of phosphate of lime, the plaintiff sold it with a like representation, and it turned out to be false, his customers would undoubtedly have a right to call upon him for compensation; and I think that would be a damage naturally flowing from the defendant's breach of warranty. But it is not necessary to rest our decision upon that ground here. There was evidence that the superphosphates, for which the plaintiff had paid 5*l.* 5*s.* per ton upon the faith of Wilson's guarantee, was in reality worth only 2*l.* 2*s.* per ton. The jury gave by way of *damages the difference between the real value and the price paid for the article: and I think there was abundant evidence to justify their verdict. [*157 [*158

CROWDER, J.(*a*)—I also am of opinion that this rule should be discharged. First, as to the contract. That is evidenced by the letters of Wilson, and principally from that of the 4th of February. It is said that this was Wilson's contract. But Wilson made the contract with the plaintiff on behalf of the defendant, and the goods were sent directly from the defendant. The defendant sent an invoice apparently in the usual course, and drew upon the plaintiff for the amount. Wilson clearly made the contract as agent for the defendant. Then it is said, that, assuming that Wilson was the defendant's agent, he had no authority to warrant the quality of the article. There was a conflict of evidence at the trial as to whether it was usual to warrant the quality of these artificial manures: the jury found that it was. That being so, and Wilson being the authorized agent of the defendant to sell for him, the presumption is that he was authorized to do what was usual and necessary: and there is nothing to take this case out of the ordinary rule. I think there was ample evidence to warrant the conclusion at which the jury arrived, more especially because Wilson was not called. As to

(*a*) Williams, J., was engaged in the Divorce Court.

the damages, it is insisted that the 20*l.* paid by way of compensation to Robins, to whom two tons of the mixture had been sold, was not the natural and necessary result of the defendant's breach of contract. I do not think it necessary to determine that point, though, if it were, I should feel little hesitation in holding that this was not too remote a damage. But that part of the evidence to which Mr. *Prentice* referred
*159] was enough to satisfy the jury that *the value of the manure was less by the amount they have given than the price paid by the plaintiff for it: and upon that ground their verdict may be sustained.

BYLES, J.—I am of the same opinion. The fair result of the letters is, that the contract for the rescission of the bargain for the blood-manure (which Wilson had made as agent for the Blood-Manure Company), and that for the sale of the 20 tons of superphosphates, were two distinct and independent contracts. Assuming, however, that it was one contract,—a sort of trilateral contract,—still I think the plaintiff might well maintain this action. As to the authority of Wilson: it is contended on the part of the defendant that Wilson was not his agent. He, however, adopted the contract in some of its terms; and it may fairly be presumed that the whole were communicated to him. He stated at the trial that he had expressly forbidden Wilson to warrant; and he swore that Wilson did not communicate the fact of the warranty to him. The jury probably did not believe him: and Wilson was not called. But, when the jury found that it was usual to sell these artificial manures with a warranty, the nice distinctions as to the extent of the agent's authority became quite immaterial. An agent to sell has a general authority to do all that is usual and necessary in the course of such employment. If it was usual, therefore, to warrant the quality of the article in question, even though Wilson had no express authority from the defendant to warrant, if he had a semblance of authority communicated to him by his principal, upon which those who dealt with him had a right to rely, his principal is bound. I think there was abundant evidence of such authority. Then, as to the damages,—I told the jury, in substance, that, if the defendant sold the manure knowing that it was
*160] to be *resold by his customer, he would be responsible for any loss or damage resulting to his vendee from his reliance upon the warranty or upon the quality of the article sold. The jury, however, took another and perhaps a more satisfactory course; for, they gave the plaintiff the difference between the price paid for the 10 tons of inferior manure and the sum proved to be its true market value. The verdict, therefore, is in this respect quite satisfactory.

Rule discharged.

Where an article is sold with a warranty, and the vendee resells with a like warranty, the sum paid by him in an action by his subvendee, for a breach of that warranty, is primâ facie evidence of the amount which he will be entitled to recover from his vendor, in an action on his own behalf: Reggio *v.* Bragiotte, 7 Cushing 166; Armstrong *v.* Perry, 5 Wend. 505; Blasdale *v.* Babcock, 2 Johnson 518.

In Muller *v.* Eno, 4 Kern. 597, it was held that a purchaser may recover for a breach of a warranty, although he has sold the goods, and no claim has been made on him, and that it was not necessary for him to show the price on the resale. That price may be evidence of the damages, but does not furnish the rule in respect to them.

JOSEPH SEWELL, Appellant; WALTER TAYLOR, Respondent.

Nov. 14.

A private house and garden where a sale by public auction takes place is for the time a "place of public resort" within the 5 G. 4, c. 83, s. 4.

THIS was a case stated by justices for the opinion of the court, pursuant to the statute 20 & 21 Vict. c. 43:—

On the 4th of April, 1859, Joseph Sewell was brought in the custody of Walter Taylor, a constable for the borough of Congleton, in the county of Chester, before E. H. S. and E. L. M., two of the justices of the said borough, and charged, "for that he, on the 30th day of March, 1859, being a suspected person or reputed thief, did frequent a place of public resort in the said borough, with intent to commit felony, contrary to the provision of the Vagrant Act, 5 G. 4, c. 83, s. 4." The prisoner was remanded twice; and the examination was concluded on the 14th of April, 1859.

The justices found it proved that the prisoner was a suspected person, and that, on the 30th of March, he was at a sale of household furniture, books, pictures, &c., held at a place called Moody Hall, in this borough; that such sale was called by public placards posted in *the town and neighbourhood several days previously to its being held; that at least three hundred persons were there congregated; [*161 that the sale was by public auction; that it was held, on two consecutive days, in a house and garden adjoining one of the public streets of this borough; and that the prisoner was there with intent to commit a felony.

On behalf of the prisoner, it was contended that private premises, on which a sale by public auction was being held, did not come within the meaning of the term "place of public resort," in the 4th section of the act; and that a place of public resort meant a place to which the public were in the habit of resorting, and not a mere special assemblage or collection of persons for a purpose which might never occur there again.

The justices decided that there was a difference between a place of public resort and a place of common resort; that the above-mentioned place of sale was a place of public resort to all intents and purposes for the time being, for that the public had full and free access thereto, and passed and repassed at will to and from the said sale; and that, as many persons did actually resort thereto, it was such a place as was intended to be protected by the section. They accordingly convicted the prisoner of being a rogue and vagabond within the intent and meaning of the 4th section of the said statute, and ordered him to be committed to the house of correction at Nether Knutsford, in the county of Chester, with hard labour, for two calendar months.

Morgan Lloyd, for the appellant.—The question is whether the house and garden mentioned in the case constituted a "place of public resort" within the 4th section of the 5 G. 4, c. 83. That section enacts, amongst other things, that "every suspected person or *reputed thief frequenting any river, canal, or navigable stream, dock, [*162 or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or *any place of public*

resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony," "shall be deemed a rogue and vagabond, within the true intent and meaning of this act; and it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months." It is submitted that a "place of public resort" means a place which is in its nature public,—permanently public and open to resort at all times, and not a place like this, which was a private house, to which the public were merely invited on the special and particular occasion of the sale. Such an accidental circumstance cannot alter the character and legal description of a place. In Ex parte Brown, 21 Law J., M. C. 113, Patteson, J., intimated an opinion, contrary to the view of the rest of the court, that the offence under this statute can only be committed by frequenting a street or highway leading to a canal, river, dock, &c., or adjacent to a place of public resort. The Court of Exchequer, in Ex parte Jones, 21 Law J., M. C. 116, adopted the opinion of Patteson, J., and held that the statute does not render any suspected person or reputed thief who may be found frequenting a street with intent to commit felony liable to be punished as a rogue and vagabond, unless the street leads to some river, canal, &c., or is itself a place of public resort, or is adjacent to a place of public resort; and therefore, where a commitment stated "that A., *163] being a suspected person, did on, &c., *at, &c., in the county of M., unlawfully frequent a certain street, to wit, a street called Regent Street, with intent to commit a felony,"—it was held that she was entitled to be discharged on a writ of habeas corpus. Pollock, C. B., there says: "There is nothing in this commitment to show that this street called Regent Street is a place of public resort; it may be a private street; and, if it be not a place of public resort, in order to constitute it an offence for a suspected person to frequent it, it must be stated that it leads to that which is meant to be protected, that is to say, a place of public resort. We are bound, when the liberty of the subject is concerned, to take care that the great powers which are intrusted to magistrates by this act are not exceeded." In Ex parte Davis, 26 Law J., M. C. 178, a platform of a railway station was held to be a place of public resort within the statute; but that, like a church or a place of public theatrical or musical entertainment, is a place to which the whole public have a right to resort at proper times. In Davys, app., Douglas, resp., 28 Law J., M. C. 193, a booth used as a theatre by strolling players was held not to be "a house or other *place of public resort* for the public performance of stage-plays," within the meaning of the statute 6 & 7 Vict. c. 68, s. 2. This house and garden surely cannot be considered more a place of public resort than the booth was there.

M'Intyre, for the respondent, was not called upon.

Erle, C. J.—I am of opinion that there is no ground for this appeal. It seems to me that the magistrates were quite right in their decision, and that, at the time when the appellant was apprehended, the place he was found in was "a place of public resort" within the meaning of the

statute. I see nothing in the language *of the act to require that the place shall be a permanent place of resort all the year round. The object of the provision is the protection of large assemblies of persons from the depredations of thieves and pickpockets; and the permanent character of the assembly appears to me to be quite immaterial. The places are made protected places whilst being used for public resort. I take that to be the test. Suppose a race or a cricket-match to take place in a meadow, to which the public were invited to come, would not that be for the time a place of public resort? I think it would, and that the streets immediately adjoining would be "streets, highways, or places adjacent thereto" within the fair meaning of the act, and therefore for the time being protected places. It would, as it seems to me, be a very narrow construction of the act to hold that it is confined to places which are permanently open to the public. If that were the true construction of the act, it might be said that a theatre which is only open to the public at certain hours in the evening, or a church which is only open during divine service, is not a "place of public resort" within it. Nobody would ever venture to suggest that. I think it quite clear that this place was at the time a place of public resort, and therefore that the conviction was right. [*164

CROWDER, J.(a)—I am of the same opinion. The words of the statute are very large. A great number of places are enumerated, and the words must be taken to extend to every place where the public do resort, and are not necessarily to be confined to places which are always or generally places of open and public resort.

BYLES, J.—It seems to me also that the construction *which has been put upon the act by my Lord and my Brother Crowder is clearly the true one. None of the places named in the act are necessarily places of permanent public resort. The place where this person was apprehended was a place which at the time was resorted to by the general public by invitation. It is clearly within the mischief of the act. [*165

Conviction confirmed.

(a) Williams, J., was engaged in the Divorce Court.

SICKENS and Another *v.* IRVING and Others. *Nov.* 4.

An agent at a foreign port to whom a ship is addressed for loading under a charter-party, has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo.

THIS was an action for not loading a cargo of salt as per charter-party.

The first count of the declaration stated that the defendants agreed by charter-party that the plaintiffs' ship Louise Roffelleine, then at the Texel, should with all convenient speed sail and proceed to Mayo (Cape de Verde), having liberty to take cargo to St. Vincent's viâ Swansea, or so near thereto as she could safely get, and that the defendants' agents should there load her in regular turn as customary with a full and complete cargo of salt in bulk, to be brought to and taken from alongside at merchants' risk and expense, which she should carry to

Monte Video for orders to discharge there or at Buenos Ayres: Orders to be given within twenty-four hours after arrival, or so near thereto as she could safely get, and deliver on being paid freight as follows, that is to say, 27*s.* 6*d.* per ton of 20 cwt. of salt delivered, in full of all port-charges, dues, and pilotage; the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever *during the said voy- *166] age always excepted: The freight to be paid on right delivery of cargo, in cash for ship's use, and the balance by good and approved bill on London at sixty days' sight: And it was thereby agreed that 20 tons per working-day were to be allowed the defendants, if the ship should not be sooner despatched, for discharging the salt, and ten days on demurrage over and above the said lay days, at 5*l.* per day: Averment, that the plaintiffs did all things necessary on their part, and all things were done to entitle them to have the agreed cargo loaded on board said ship at Mayo, and that the time for so doing had elapsed: Breach, that the defendants and their agents made default in loading the salt at Mayo according to the terms of the charter-party.

The declaration also contained counts for freight, hire, and demurrage of ships, and a count for moneys found due upon accounts stated.

Plea, to the first count, that the said ship did not stay and continue at Mayo until it was her regular turn as customary to be loaded, as in the declaration mentioned; and, to the residue of the declaration, never indebted.

The plaintiffs took issue upon both pleas. And, for a further replication to the first plea, said that the said ship was ready and willing to stay and continue at Mayo until loaded, pursuant to the charter-party, but that the defendants' agents, before any breach of such charter-party by the plaintiffs, informed the captain of the ship that they had no salt for him, and that they should not be able to load the said ship with salt according to the said charter-party; that the defendants' agents then discharged and released the said ship and captain from the necessity of staying and continuing at Mayo any longer, and requested him to sail away from Mayo without waiting for the agreed cargo, and *to *167] proceed to another port, to wit, the island of Boa Vista, for a cargo of salt, which the said agent promised to ship there; and that the captain thereupon did sail away accordingly, and did proceed to the said port, and did ship there the said cargo of salt. Upon this replication, the defendants joined issue.

The cause was tried before Erle, C. J., at the sittings in London after last Trinity Term. The facts were as follows:—

The plaintiffs were shipowners at Amsterdam; the defendants merchants in London. The action was brought to recover damages for not loading a cargo of salt on board the plaintiffs' vessel the Louise Roffelliene, pursuant to the charter-party declared on, which bore date the 1st of January, 1857. At the time the charter-party was entered into the ship was in the Texel, whence she shortly afterwards sailed for Swansea, arriving there on the 17th of January, and took in her outward cargo. At Swansea the captain received orders from the charterers to proceed to Mayo, one of the Cape de Verde Islands, and address himself to their agents, Messrs. Naure & Pinto, for a cargo of salt,

with which he was to proceed to the River Plate, and wait orders for discharge at Monte Video from Messrs. Getting, of Buenos Ayres.

The vessel arrived at Mayo on the 22d of March, and the captain applied to Naure & Pinto for a cargo of salt, pursuant to his instructions. The substance of what took place at that interview was thus stated in the examination of the captain before one of the masters:—"Mr. Pinto said there was not salt in the island of Mayo for me, and that he should not be able to load my ship in any reasonable time, as there were so many ships (I think about twelve) waiting for salt, whose turn it would be to load before me. He did not ask me to wait, but told me to go off to Boa Vista, another of the *Cape de Verde Islands, about eighty or one hundred miles distant, and not in [*168 my course from Mayo to Buenos Ayres. I said I did not like to go there unless he gave me security. I again asked for a cargo of salt: he again said there was no salt there. I did all I could to get salt there, but could not get any. I said I would go to Boa Vista, if he would give me a guarantee: and he gave me this,"—producing it.

The captain accordingly proceeded to Boa Vista, Pinto going with him. He there took on board 350 tons of salt, for which he signed bills of lading, and proceeded therewith to Monte Video, where he received orders from Messrs. Getting to go to Buenos Ayres, at which place he arrived on the 5th of June.

It was proved that Boa Vista salt was a very inferior and almost unsaleable article. The charterers, as soon as the transaction came to their knowledge, repudiated it altogether.

On the part of the plaintiffs it was contended that the replication was proved,—that there was a breach of the charter-party when the charterers' agents, Naure & Pinto, refused to furnish a cargo at Mayo,—and that, whether there was or was not an absolute refusal, Naure & Pinto, as agents of the charterers, had an implied authority to substitute Boa Vista as the port of loading for Mayo, or, at all events, the captain was warranted in assuming that they had such authority.

The learned judge ruled that Naure & Pinto had no express authority to vary the contract by substituting a different place of loading, and that none could be implied: and he left it to the jury to say whether Naure & Pinto had absolutely refused to load a cargo of salt at Mayo, or whether they would not rather imply from the conduct of the parties that there had been a mutual agreement between them and the *captain to go to Boa Vista rather than wait the ship's turn at [*169 Mayo, and so that there had been no breach.

The jury returned a verdict for the defendants.

J. Wilde, Q. C. (with whom was *Honyman*), now moved for a new trial on the grounds of misdirection, and that the verdict was against the evidence.—There was a clear breach of the charter-party the moment the charterers' agents informed the captain that they had no cargo for him. The Lord Chief Justice, therefore, was clearly wrong in putting it to the jury in the alternative,—was there a breach or a substituted agreement? [ERLE, C. J.—I left it to the jury to say whether the charterers' agents had broken the charter-party by an absolute refusal to supply a cargo of salt at Mayo, or whether they and the captain had not agreed to substitute Boa Vista for Mayo.] The learned judge, it is submitted, was wrong in telling the jury that Naure & Pinto had

no authority to substitute another loading port for that mentioned in the charter-party. An agent of this sort necessarily must have an implied authority to vary the performance of the contract of an absent principal within reasonable limits. It would be impossible to carry on commercial transactions with any advantage if such an authority did not exist. [ERLE, C. J.—It must be borne in mind that the substituted port was eighty or a hundred miles distant from that originally stipulated, and that the substituted article was also widely different.] Even if the agents had no authority to deviate from the strict course pointed out by the charter-party, the captain under the circumstances had a right to assume that they had such authority. [BYLES, J.—The fact of the captain having asked for an indemnity before he consented to go to Boa Vista affords some evidence that he knew the agents had no authority *170] to direct the *deviation, or, at all events, that he did not act upon the assumption that they had authority.] Considerable latitude of discretion must in these cases be given to an agent; otherwise great inconvenience and probably serious loss will be many times occasioned by the captain's insisting upon a strict literal compliance with the terms of the charter-party. [ERLE, C. J.—The contract was in writing. How could I leave it to the jury to say whether the agents had authority to vary it? If they might substitute Boa Vista as the loading port for Mayo, and Boa Vista salt (which was nearly valueless) for Mayo salt, why might they not substitute any other description of cargo?] Of course, the agent's authority must be exercised within reasonable limits: and, as far as the shipowners were concerned, there was a substantial fulfilment of the contract. [CROWDER, J.—If that had been put to the jury, I very much doubt that they would have found there had been a substantial fulfilment of the contract.]

WILLIAMS, J.—I am of opinion that there ought to be no rule in this case. As to the verdict being against evidence, the Lord Chief Justice intimates that he is not dissatisfied with the verdict, and I see no reason why we should be. As to the supposed misdirection, the learned counsel for the plaintiffs relies upon two branches. In the first place, he says that my Lord was wrong in putting the question as to the breach of the charter-party in the alternative. But that seems to be a mistake. It was not put in the alternative: it was merely put to them as an explanation of the transaction. After adverting to what had taken place between the parties, my Lord put it to the jury whether they thought it amounted to a renunciation of the charter-party, or whether the voyage to Boa Vista was by mutual agreement of the charterers' *171] *agents and the captain substituted for the original voyage. It seems to me that the direction was quite unexceptionable. The next objection is as to the authority of Naure & Pinto to vary the contract by substituting Boa Vista as the port of loading for Mayo. This was put in two ways. First, it was said that Naure & Pinto had an implied authority to vary the contract; secondly, that, at all events, the captain had a right to presume that they had such authority. Now, there can be no doubt that an agent appointed to load a cargo at a foreign port has authority to do all acts that are necessary for the performance of the contract, and also to vary the mode of performance if any exigency arises, provided the contract be substantially performed. But there is no ground for contending that he has by law any implied

authority to substitute a new contract,—to substitute one sort of commodity for another, sugar for salt, for instance,—or to appoint a different place of loading from that contemplated by the charter-party. It is quite new to me to hear it suggested that he has such authority; and I cannot but think that it would be very mischievous if the agent's authority could be so extended as thus to vary the contract of his principal. Then, as to the right of the captain to presume that Messrs. Naure & Pinto had this authority. I must confess I see no reason why there should be any such presumption. And, even if such a presumption could be made, there is no evidence here that the captain gave credit to the supposed authority of the agents. If the plaintiffs had intended to rely upon the captain's being justified in assuming this authority, they should have gone on to show that he did act upon it: whereas here, he appears to have repudiated it; for, he refused to go to Boa Vista unless indemnified. Upon the whole, I think the real question was left to the jury, and the verdict is justified by the evidence.

*CROWDER, J.—I am of the same opinion. The Lord Chief Justice being satisfied with the verdict, I see nothing in the evi- [*172 dence to induce me to think the jury have come to a wrong conclusion. As to the alleged misdirection, the objection is two-fold. In the first place, it is said that my Lord, instead of leaving it to the jury to say whether or not there had been an absolute refusal on the part of the charterers' agents, Naure & Pinto, to load a cargo at Mayo, left it to them in the alternative, whether there was a refusal to load or a substituted contract by mutual agreement of the agents and the captain. It seems, however, from my Lord's note that he distinctly left it to the jury to say whether there was an absolute refusal to load. They found there was not. Then, as to the other ground,—it is said that it was a misdirection to tell the jury that Naure & Pinto had no authority to substitute a loading at Boa Vista for a loading at Mayo. It has been contended that the position of the agents necessarily gave them an implied authority to give the order they did, and that the captain was justified in assuming that they had such authority. I see no reason for presuming that the agents had authority to send the ship to a different port, eighty or a hundred miles distant from that originally stipulated, for the purpose of loading a totally different commodity. I see no ground for presuming that an agent can have so extensive an authority as that contended for. We have been much pressed with the great inconvenience which will result from its being held that the captain is bound to follow the precise terms of the charter-party. I do not assent to that argument. Where a contract of this sort is necessarily deviated from in some particular, the question always will be whether or not it has been substantially performed: and that is a question for the jury. Here, however, that question *cannot arise; for, the contract the [*173 defendants entered into never was performed at all. They contracted for a cargo of salt to be loaded at Mayo: the supposed performance was, the loading a cargo of a different article, though bearing the same name, at a distant port. I am also disposed to believe that the captain did not think that Messrs. Naure & Pinto had authority thus to vary the contract.

BYLES, J.—I am of the same opinion. The direction of the Lord Chief Justice, as I understand it, was this,—Was there an absolute

refusal on the part of the charterers' agents to load the ship in due course? The jury found there was not. So far the direction is admitted to have been right. But the learned counsel for the plaintiff says that the direction was insufficient, and did not embrace all that it ought to have embraced. But he did not suggest anything else which ought to have been left. It was contended that the agents necessarily had an implied authority to deviate from the strict letter of the charter-party: or, in other words, that they had an implied authority to direct the loading of a different article at a distant port. It seems to me, however, that the agents had no such authority in point of law. As well might it be said that an agent having authority to load a cargo of coals at Newcastle, would be justified in sending the vessel round to Swansea or Cardiff for a cargo of Welsh coal. It seems to me that that would be a parallel case. I agree, that, if the authority really given to an agent does not go so far as parties dealing with him have a right to expect it does, the principal may still be bound by his acts. But, to entitle them to avail themselves of that presumption of a more extensive authority, the parties must show that they have been deceived, and have
*174] acted under an impression of its existence. *In the present case, not only was there no evidence that the agents had any implied authority, or that the captain acted upon the assumption that they had it; but the fact of his having asked for and obtained an indemnity clearly shows that he did not suppose they had the authority they assumed to have. For these reasons, I concur with my Brothers Williams and Crowder in thinking that there is no ground to find fault with the direction to the jury. And, as to the verdict being against evidence, the Lord Chief Justice has expressed himself satisfied, and I see no ground upon which we can object to it.

ERLE, C. J.—I have nothing to add to what has fallen from the rest of the court, except that I think this decision is one of very considerable importance; for, if Mr. *Wilde* had succeeded in his argument, it might have thrown doubt upon the well-known, and to the mercantile world most important rule that an agent must be strictly limited by his authority. The substitution of a different voyage from that which is stipulated for by the charter-party is a matter which must be regarded as totally beyond the scope of an ordinary agent.

Rule refused.

*175] *BARBER v. LESITER. *Nov.* 11.

The declaration stated that the plaintiff was possessed of certain messuages and premises; that the defendant and one S. unlawfully and maliciously conspired to procure possession of a portion of the premises, and to set up and keep private stills thereon; that, in pursuance of such conspiracy, they, by falsely pretending and representing to the plaintiff that S. wanted such portion of the premises for the carrying on therein of a lawful trade, induced the plaintiff to demise them to him; that, in further pursuance of such conspiracy, the defendant and S. entered and took possession of the premises and set up concealed stills therein, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up such stills and was the proprietor thereof; that the defendant and S. worked the stills, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so used the stills; and that, by

means and in consequence thereof, an excise officer entered, and, finding the plaintiff upon the premises, took him before a magistrate, who convicted him of keeping illicit stills:—
Held, that the declaration disclosed no cause of action,—the damage to the plaintiff not appearing to have been the natural and proximate consequence of the defendant's act.

THE declaration stated that the plaintiff being possessed of certain messuages and premises of him the plaintiff, situate and being in Vine Street, Bedford Street, Gray's Inn Lane, in the county of Middlesex, and within the metropolitan police district, and within the limits of the chief office of inland revenue in London, and on which premises he then and from thenceforth until and at the times of the committing of the grievances thereinafter mentioned carried on his trade and business of a skin-dresser,—the defendant and one William Savage unlawfully and maliciously conspired, combined, confederated, and agreed together to procure possession of a portion of the said messuages and premises, and to set up and keep private and concealed stills in such portion for making and distilling low wines and spirits, and, whilst the said premises and such portion thereof should respectively be and continue a private and unentered place, to manufacture therein, and have and keep therein manufacturing and in the course of manufacturing, goods and commodities for and in respect whereof duties of excise then were and should from time to time continue to be imposed, and materials and preparations for manufacturing such goods and commodities, contrary to the statutes in that behalf: That thereupon, and in pursuance of such conspiracy, *combination, confederacy, and agreement, they the defendant and the said William Savage, then, by falsely and [*176 fraudulently pretending and representing to the plaintiff that the said William Savage wanted and required such portion of the said premises for the purpose of carrying on therein a lawful and innocent trade and business, to wit, the trade and business of an ink-manufacturer, induced and persuaded the plaintiff to let and demise the same to the said William Savage, and to permit him and the defendant to enter upon and have and take possession thereof: That thereupon, and in further pursuance of such conspiracy, combination, confederacy, and agreement, they the defendant and the said William Savage then accordingly entered into and upon such last-mentioned portion of the said premises, and had and took possession thereof, and then set up and kept, and became and were and continued to be the proprietors and had the custody of certain private and concealed stills in and upon such last-mentioned portion of the said premises, for making and distilling low wines and spirits, contrary to the statute in that behalf; and then, and in further pursuance as aforesaid, they falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed, that it was the plaintiff who had so set up and so kept such stills, and was the proprietor and had the custody thereof; and also then, and in further pursuance as aforesaid, and whilst the said premises and the said portion thereof respectively were and continued to be a private and unentered place, they the defendant and the said William Savage manufactured and had and kept in and upon such portion of the said premises manufacturing and in the course of manufacturing, goods and commodities for and in respect whereof duties of excise then were and *from time to time and during all [*177 the time therein mentioned continued to be imposed, and mate-

rials and preparations for manufacturing such goods and commodities, contrary to the statute in that behalf; and then, and in further pursuance as aforesaid, falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed, that it was the plaintiff who so manufactured, had, and kept such goods and commodities, materials, and preparations, respectively, in manner aforesaid, and that he was knowingly aiding, assisting, and concerned in the manufacturing of such goods and commodities; whereas, in truth and in fact, the plaintiff during all the time aforesaid was wholly innocent and ignorant of the several offences aforesaid and each and every of them: by means and in consequence of which said grievances one Benjamin Tyler, an officer of excise, found in and upon the said portion of the said premises (the same then being such private and unentered place as aforesaid) manufacturing and in the course of manufacturing, divers of the said goods and commodities for and in respect whereof duties of excise were then imposed as aforesaid, and divers of the said materials and preparations for manufacturing such goods and commodities, to wit, 100 gallons of British spirit, two stills, 200 gallons of molasses-wash, and other articles used in the manufacturing of such spirit, and did at the same time discover in and about such place the plaintiff, who then by reason of the premises aforesaid appeared to be (though in truth and in fact he was not) knowingly aiding, assisting, and concerned in the manufacturing of such last-mentioned goods and commodities; whereupon such officer arrested and detained the plaintiff, and conveyed him before one of the magistrates
*178] of the police courts of the metropolis sitting at the Clerkenwell *police court, in the county of Middlesex, and within the metropolitan police district, and then and there exhibited and made an information and complaint upon oath before the said magistrate against the plaintiff, that he the said Benjamin Tyler had so found in such private and unentered place manufacturing and in the course of manufacturing the said last-mentioned goods and commodities for and in respect whereof a duty of excise was imposed, and the said materials and preparations for manufacturing such goods and commodities, and that he did at the same time discover in and about such private and unentered place the plaintiff knowingly aiding, assisting, and concerned in the manufacturing of such goods and commodities, contrary to the form of the statute in that behalf; and thereupon (the plaintiff being by reason of the said devices of the defendant and the said William Savage unable to make manifest or prove his innocence in the premises) such magistrate adjudged that the plaintiff should for such alleged offence forfeit and lose the sum of 30*l.*, to be immediately paid into the hands of the said Benjamin Tyler, and that, if the said sum should not be so paid, the plaintiff should be imprisoned in the House of Correction at Cold Bath Fields, and there kept to hard labour for the space of three calendar months, unless the said sum should be sooner paid; and, the plaintiff not being able to pay the said sum, the said magistrate thereupon by warrant under his hand and seal committed the plaintiff to such House of Correction accordingly; by virtue of which warrant the plaintiff was accordingly taken to and imprisoned in such House of Correction, and kept to hard labour there for the space of time last aforesaid: That, after the expiration of such space of time,

and by reason and in consequence of the said acts and devices of the defendant and the said William Savage, John Latten and *William Jones, two other officers of excise, having found and discovered two of the said private and concealed stills for making and distilling low wines and spirits in the said portion of the said premises, and having seized the same, and the plaintiff then, by reason of the said devices of the defendant and the said William Savage, appearing to be (though in truth and in fact he was not) the proprietor of the same, and to have the custody thereof, one James Nash, another officer of excise, then went and appeared before one of the metropolitan police magistrates sitting at the metropolitan police court at Bow Street, in the county aforesaid, and then and there exhibited and made an information and complaint upon oath before such last-mentioned magistrate against the plaintiff, that he the plaintiff was the proprietor of such private and concealed stills, and that the said John Latten and William Jones had found and discovered the same in his custody, contrary to the statute in that behalf, whereby he had forfeited certain penalties (which last-mentioned information and complaint was afterwards duly determined): By means of which premises the plaintiff not only had been greatly harassed and put to great expense in and about defending and endeavouring to defend himself against the said charges, and otherwise, but, by reason of the said prosecutions and imprisonment and hard labour occasioned as aforesaid, and the anxiety and distress of mind thereby caused, he was prevented and disabled from attending to his business and affairs, and brought into discredit with and amongst his business connections, friends, and neighbours and acquaintances, who had believed and still believed him to be guilty of the offences aforesaid; and by reason thereof his trade had been wholly destroyed, and he was utterly ruined, and his bodily health had been and was greatly impaired, &c. [*179

*To this declaration the defendant demurred,—the grounds of demurrer stated in the margin being,—"that it does not appear that the conspiracy was for the purpose of injuring the plaintiff, or that he sustained any legal damage or injury thereby; and, as it appears that the plaintiff was convicted, no action lies in respect of such conviction; and it does not appear whether or not the plaintiff was convicted or acquitted on the information last mentioned in the declaration, or how such information was determined;" and "that an action does not lie for causing or procuring legal proceedings to be taken against a party, where he is convicted." [*180

The plaintiff joined in demurrer.

Shaw, in support of the demurrer.(*a*)—This is either an action for a malicious prosecution, or it is an action founded upon the commission

(*a*) The points marked for argument on the part of the defendant were as follows:—

"That the declaration shows no cause of action against the defendant: That it does not appear that the conspiracy was for the purpose of injuring the plaintiff: That it does not appear that the plaintiff has sustained any such damage or injury from the conspiracy complained of as will enable him to maintain this action: That, as the plaintiff was convicted, no action lies in respect of the grievances complained of; but that, if the conviction was wrong, it should have been appealed against or otherwise quashed: That it does not appear how the information last mentioned in the declaration was determined,—whether the plaintiff was convicted or not thereon: And that an action does not lie for causing legal proceedings to be taken against a party, where he is convicted."

by the defendant of an unlawful act from which damage has resulted to the plaintiff. If the former, the declaration is bad for not showing that the plaintiff was acquitted or the charge dismissed.. [*Joyce*, for the plaintiff, denied that this was an action for a malicious prosecution.]

*181] Neither *can the action be sustained on the second ground, inasmuch as the declaration shows no damage resulting to the plaintiff from the defendant's act. In the notes to Skinner *v.* Gunton, 1 Wms. Saund. 229 *b*, it is said: "A writ of conspiracy, properly so called, did not lie at the common law in any case but where the conspiracy was to indict the party either *of treason or felony*, by which his life was in danger, and he had been acquitted of the indictment *by verdict;* and such writ, it is true, could only have been brought against two persons at least: F. N. B. 114 D., 116 K., Saville *v.* Roberts, Carth. 417. But all the other cases of conspiracy, called in the old books *writs of conspiracy*, are in truth nothing else but *action upon the case*, and not properly writs of conspiracy; though in most, if not all of them, it was usual to insert the words per conspirationem inter eos habitum; and *these* actions, it was always held, might be brought against one person only: F. N. B. 114 D., 116 A. K., Saville *v.* Roberts. They seem either to have been first given by, or at least to have been first introduced after, the statute of 21st (commonly called 33d) of Edw. 1, which gives the form of the writ in these actions, 'ad respondendum &c. de placito conspirationis et transgressionis:' 11 H. 7, fo. 26 a. In the present case, there seems to be no doubt that it is only an action upon the case in the nature of a conspiracy; for, the *damage* sustained by the plaintiff is the ground of the action, and not the conspiracy: Saville *v.* Roberts, Bul. N. P. 14." Here, the plaintiff shows no legal damage at all resulting from any act of the defendant. That which is alleged as damage, is the act of the law, which works no wrong to any man. In Sedgwick on Damages, 2d edit. p. 30, it is said: "In addition to the great class of moral rights and duties which the law does not

*182] attempt to protect or enforce, there are *many more sufferings inflicted by human agency, where the immediate instruments of the injury are free from fault, or the act beyond their control. In these cases the law does not seek to interfere. It is only legal injury that sets its machinery in motion: and this is meant by the maxim that 'damnum absque injuria' gives no cause of action.' 'If the defendants have only pursued the path presented for them by the laws from which they derive their existence, they have committed no wrongful act. Though the plaintiff may have sustained damage, it is damnum absque injuria, for, the act of the law, like the act of God, works no injury to any one.(*a*) There must, too, not only be *loss*, but it must be injuriously brought about by a violation of the *legal rights* of others.' 'No one, legally speaking, says the Supreme Court of New York, 'is injured or damnified, unless some right is infringed.'"(*b*) [WILLIAMS, J.—Suppose two men conspire to make it appear that a third person has been guilty of a felony, by placing stolen goods upon his premises, and he is in consequence convicted,—would an action lie?] If the conspiracy was, to procure the conviction of the third party by means of perjury. Here, that which is alleged for damage does not arise from the unlawful

(*a*) First Baptist Church *v.* Sch'y. and Troy R. R. Co., 5 Barb. S. C. R. 79.
(*b*) Mahon *v.* Brown, 13 Wend. 261.

conspiracy, but from the plaintiff's being found upon that part of the premises where the still was, and the officer making a false charge against him upon oath. That clearly is too remote: defendant is not responsible for that. [WILLIAMS, J.—The plaintiff will probably rely upon the allegation that the defendant falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who *had so set up and so kept such stills, and was the proprietor and had the custody thereof.] That would be shifting it to an action for malicious prosecution. [BYLES, J.—The only ground of damage is the plaintiff's being legally convicted.] Just so. [CROWDER, J.—The defendant's act of conspiring merely caused him to get possession of the premises.] That is not the damage alleged. [*183

Joyce, contrà.(*a*)—The declaration is good in *substance; not as a declaration for a malicious prosecution, the conviction being conclusive, on grounds of public policy: Floyd *v.* Barker, 12 Co. Rep. 23. But the declaration discloses a wrongful act on the part of the defendant and another, whereby the plaintiff has sustained damage. The case is not to be distinguished from Blewitt *v.* Hill, 13 East 13, where the owner of a ship was held to be entitled to maintain an action against the captain (who was in command under the lords of the Admiralty) for causing the forfeiture of the vessel by having smuggled goods on board. [ERLE, C. J.—There, the damage was the necessary and immediate consequence of the defendant's illegal act. Suppose the plaintiff had been apprehended and convicted as a receiver of stolen goods,—have you any authority for saying that an action could be maintained against the defendant because he brought the goods upon the premises?] In Comyns's Digest, *Action upon the Case* (A.), it is laid down, that, "in all cases where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case to be repaired in damages." "So, if A. brings rude persons into a vintner's [*184

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That it appears from the declaration that the defendant was guilty of an indictable conspiracy, and that, in carrying the same into effect, damage resulted to the plaintiff, and that such damage is a ground of action:

"2. That it is immaterial whether the conspiracy, or the acts done in furtherance thereof, were for the purpose of injuring the plaintiff, such injury being their natural result:

"3. That it also appears from the declaration that the defendant obtained possession of the plaintiff's premises by false and fraudulent and deceitful representations for illegal purposes, and also fraudulently and maliciously represented and made it appear that he was the keeper of the stills, &c., and that damage resulted from the false representations intended by the defendant to be, and which were thus acted on by the plaintiff, and the other fraudulent and malicious acts and representations of the defendant, which damage is a ground of action:

"4. That the plaintiff has sustained damage by the wrong of the defendant, and is consequently entitled to reparation:

"5. That, the plaintiff's conviction having been brought about by the conspiracy and fraud and malice of the defendant, an action lies in respect of the same and the damage thereby occasioned:

"6. That the action not being for malicious prosecution, but for conspiracy and fraud committed in violation of the statute law, the fact of the plaintiff's conviction is no bar, but rather matter going in aggravation of damages:

"7. That the defendant was not the prosecutor, and, for aught that appears, did not desire to procure the conviction of the plaintiff, but rather the contrary; and, the action being thus in its nature essentially different from an action for malicious prosecution, any rule (supposing it to exist) that a person who has been convicted by means of a conspiracy and false evidence is without redress for the damages sustained, does not apply to the present case:

"8. That in actions for malicious prosecutions, no such rule exists as that just alluded to."

house, and procures them and the mob to cry 'a bawdy-house,' by which the mob threw stones and broke the windows, action upon the case lies, for, this made the vintner liable to a prosecution for a disorderly house; *185] for, this would have been evidence of it: *Plunket v. Gilmore, Fortescue 211." (a) [ERLE, C. J.—There could be no damages for the contingency of a prosecution which might never take place.] This declaration discloses a wrongful act by the defendant, in falsely and maliciously representing to the plaintiff that he wanted the premises for a lawful purpose, and by false and fraudulent means and devices making it appear and be believed that it was the plaintiff who set up and kept the stills thereon, and so causing him to be apprehended and convicted. The conviction is only conclusive where it operates in rem. It is said that this is a novel action: but it is no objection to an action that it is new in the instance, if it be not new in its principle: per Ashhurst, J., in Pasley v. Freeman, 3 T. R. 63; per Lord Ellenborough, in Chamberlain v. Williamson, 2 M. & Selw. 415. Lumley v. Gye, 2 Ellis & B. 216 (E. C. L. R. vol. 75), was an action of a novel character, and yet it was held to be maintainable.

Shaw, in reply.—The damage which the plaintiff sustained did not result immediately and as a legal consequence from the erection of the stills by the defendant, but from the accidental circumstance of the plaintiff being upon that part of the premises which he had demised to the defendant and Savage at the time the officer came to search them. [WILLIAMS, J.—The only part of the declaration which discloses the semblance of a cause of action, is that which alleges that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up and so kept the stills, and was the proprietor and had the custody thereof; and that by means *186] and in *consequence thereof the plaintiff was apprehended and convicted.] If that part of the declaration be material, it amounts in substance to a charge of malicious prosecution. [WILLIAMS, J.—The meaning of a malicious prosecution is, that a party from malicious motives, and without reasonable or probable cause, sets the law in motion against another: but here the charge is, not that the defendant set the law in motion, but that he, from some malicious motive, so acted as to make it appear that the plaintiff was the guilty party. What is the foundation of the rule that a declaration for a malicious prosecution must allege that the plaintiff was acquitted or the prosecution abandoned?] In Vanderbergh v. Blake, Hardres 194, Lord Hale says,—"If such an action should be allowed, the judgment would be blowed off by a side-wind: and so in other actions, as, if a man be convicted of perjury, an action upon the case lies not, though the prosecution were malicious." And see Parker v. Langly, 10 Mod. 210, Kennedy v. Reynolds, 1 Wils. 232, and Cotterell v. Jones, 11 C. B. 713 (E. C. L. R. vol. 73).

ERLE, C. J.—I am of opinion that our judgment upon this demurrer ought to be for the defendant. The declaration is framed as if this were an action upon the case in the nature of conspiracy. That form of action lies, not for the conspiracy, but for the damage sustained by the plaintiff therefrom. Now, it is clear upon this declaration that the conspi-

(a) This latter passage is not found in the later editions of Comyns's Digest.

racy was not the proximate cause of the damage; nor was damage to the plaintiff in the contemplation of the parties. The defendant and Savage conspired to take the premises for the purpose of working a still and doing other overt acts. But it clearly was no part of the intention of the parties that the plaintiff should be charged with the illegal acts contemplated by them. I have looked *carefully at the declaration to see if I could discover if the declaration could be supported as alleging a damage resulting to the plaintiff from a violation of any legal right of the plaintiff: but I can find nothing of the sort. The only part of the declaration which at all approaches to such an allegation, is, the statement that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up and so kept such stills, and was the proprietor and had the custody thereof; and that, in further pursuance of the conspiracy, they falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so manufactured, had, and kept such goods and commodities, materials, and preparations respectively in manner aforesaid. I am not aware that that discloses any direct violation of any legal right of the plaintiff. There is no statement of the person to whom the alleged representations were made, or to connect them with the coming of the officer upon the premises and finding the plaintiff there, and so procuring a conviction. The declaration is partly for conspiracy and partly for overt acts, amongst which there might possibly be some which might indirectly have led to the charge against the plaintiff. If the declaration did amount to a charge that the defendant did some act which directly caused the plaintiff to be prosecuted for illicit distillation, it would fall within the rule applicable to malicious prosecutions, as charging that the defendant and Savage used the excise officer as an instrument in their hands for the prosecution they planned; and then, the plaintiff having been convicted, he could not maintain the action. It has been decided *that no action lies against a witness for uttering false statements in the course of a judicial proceeding, even though it is alleged to have been done falsely and maliciously and without any reasonable or probable cause, and damage results therefrom to the plaintiff,—the proper course being a prosecution for perjury; which is probably what was meant by Lord Hale in Vanderbergh *v.* Blake, when he says, that, to allow the action while the judgment was in force, would be to blow the judgment off by a side-wind. If the declaration had intended to charge a conspiracy and damage resulting therefrom to the plaintiff, it should have directly alleged it. But the whole tenor of this declaration is, that the defendant and Savage by their acts and conduct caused a semblance of guilt to affix on the plaintiff, whereby his conviction was procured. There is no precedent of such a declaration, and no principle upon which in my judgment it can be sustained; and I can see many substantial reasons why it should not be. I therefore think the defendant is entitled to judgment.

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WILLIAMS, J.—I also am of opinion that this declaration cannot be supported, inasmuch as the damage alleged was not the legal consequence of the acts which are imputed to the defendant. Probably,

if the declaration had been so framed as to show that the damage alleged was the legitimate consequence of the defendant's acts, it would in substance have been a declaration for a malicious prosecution. In order to avoid that, the declaration has been put in its present form. The consequence is, that it fails to show upon the face of it that the damage complained of was the legal consequence of the acts attributed to the defendant.

*189] CROWDER, J.—I am of the same opinion. The *declaration clearly cannot be supported as a declaration for a malicious prosecution. Nor is it a declaration alleging a conspiracy by the defendant and others to place the plaintiff in such a position as to cause him to be convicted of keeping and using illicit stills. The averment relied on by the plaintiff is that which alleges that the defendant and Savage falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so set up and so kept such stills, and was the proprietor, and had the custody thereof,—by means whereof the plaintiff, who was found upon the premises, being suspected of being the proprietor of the stills, was arrested and convicted. That, as it seems to me, is a very unintelligible averment: it is not alleged to whom the representation was made: there is no averment that it was made to the officer, or that anything was said or done by the defendant to point suspicion to the plaintiff. It can hardly be said that the defendant is responsible for the accident of the plaintiff being upon the premises when the officer came there. When fairly looked at, none of the averments show a damage naturally and as a legal consequence resulting from the acts of the defendant. The arrest and conviction of the plaintiff seem to have been the result of a combination of circumstances for which the defendant is not in law responsible.

BYLES, J.—I am of the same opinion. The declaration carries on the face of it an air of suspicion, because it is quite novel. Mr. *Joyce* concedes that it cannot be sustained as a declaration charging a malicious prosecution. As a declaration of that sort, it wants two essential ingredients: in the first place, the defendant was not the promoter of

*190] the prosecution complained of; *and, in the next place, the termination of the prosecution is not shown, as it must be, to have been in favour of the plaintiff. That the latter should be shown, is necessary upon two grounds,—first, that there may be no conflict between the civil and the criminal law,—secondly, because the fact of a conviction having taken place affords some evidence of reasonable and probable cause. The next question is, whether the action can be sustained as an action in the nature of conspiracy. Clearly it cannot without showing a damage to the plaintiff legally resulting from the conspiracy alleged. There are two facts alleged from which the damage is said to have flowed: the first is, that the defendant and Savage obtained possession of the premises by means of a false and fraudulent representation and pretence; but no damage is alleged as the consequence of that. The only other fact is, that the plaintiff, being upon the premises when the excise officer visited them, and being suspected of being concerned in the working of the stills, was apprehended and convicted. The conviction, however, was not the act, or the necessary consequence of an act, of the defendant: it was the act of the law; and *Actus legis*

nemini facit injuriam. It must be assumed, for the purpose of this action, that the plaintiff was properly convicted. That being so, the conviction was for that which for the purposes of this action must be taken to have been the plaintiff's own act. The proximate cause of the plaintiff's conviction was, that he happened to be upon that part of the premises which he had demised to Savage. It was a result which it cannot be supposed was contemplated by the defendant. Upon neither ground, therefore, as it seems to me, can this declaration be supported.

Judgment for the defendants.(*a*)

(*a*) See the next case.

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*STEWARD *v.* GROMETT. *Nov.* 11. [*191

In an action for maliciously and without reasonable or probable cause going before a magistrate and procuring the plaintiff to be held to bail to keep the peace, it is not necessary,—as in the ordinary case of an action for a malicious prosecution,—to aver that the proceeding before the magistrate was determined in favour of the plaintiff; such a proceeding being ex parte, and the truth of the statement made by the applicant to the magistrate not being controvertible.

THIS was an action for maliciously and without reasonable or probable cause procuring the plaintiff to be held to bail to keep the peace.

The declaration stated that the defendant falsely and maliciously, and without any reasonable or probable cause, made information upon oath before John Richardson Fryer, Esq., one of Her Majesty's justices of the peace in and for the county of Norfolk, that the plaintiff had made use of the following threats towards the defendant,—"If I could have happened of Gromett on the fair day, I would have given him such a beating as he never had before; and the first time I happen of him anywhere, I'll give him a good beating;" and that for the said threats the defendant was afraid that the plaintiff would do him some grievous bodily harm: and the defendant, upon such charge, falsely and maliciously, and without any reasonable or probable cause, caused the plaintiff to be brought and to appear before the said justice and John Mareon, another of Her Majesty's justices of the peace in and for the said county, to answer the said complaint, and falsely and maliciously, and without any reasonable or probable cause, caused the said justices to order and adjudge that the plaintiff should enter into his own recognisance in the sum of 40*l.*, with two sufficient sureties in the sum of 20*l.*, to keep the peace towards Her Majesty and all her liege subjects, and particularly towards the defendant, for the term of six calendar months: That the defendant then falsely and maliciously, and without any reasonable or probable cause, caused the said justices to make and grant their warrant to convey the plaintiff to the castle at Swaffham, *in the said county, and to deliver him to the keeper thereof, and [*192
for the said keeper to receive the plaintiff into his custody in the said gaol, and him there safely keep for six calendar months, unless the plaintiff in the meantime should enter into such recognisance with such sureties as aforesaid to keep the peace in the manner and for the time aforesaid: That the defendant under the said warrant wrongfully and

maliciously, and without any reasonable or probable cause, procured the plaintiff to be conveyed in custody to the said gaol, and there to be imprisoned for a long time, to wit, for six calendar months; and no indictment hath been preferred or prosecution commenced against the plaintiff for the said supposed threats and breaches of the peace in the said information mentioned, or for any or either of them: And that the said prosecution was and is wholly ended and determined as aforesaid: By means of which premises the plaintiff was imprisoned for the term aforesaid, and injured in health, and suffered great anxiety, and was put to expense in defending himself from the said prosecution and otherwise in relation to the premises, and was interrupted in and prevented from attending to his necessary affairs and business, and from earning his livelihood, and was and is otherwise injured. Claim, 500*l.*

The defendant pleaded,—secondly, that the said prosecution was not instituted with the view of indicting the plaintiff, the matter charged against the plaintiff not being an indictable offence, but merely for the purpose of procuring the plaintiff to be bound over to keep the peace, or to be detained in custody if he could not find sufficient sureties to keep the peace, for such time as one of Her Majesty's justices of the peace in and for the said county should think fit; that he the defendant entirely succeeded in such prosecution; and that the plaintiff was
*193] detained in custody for six *calendar months, being the time which the said justices in the declaration secondly menticned thought fit, during the whole of which time the plaintiff was unable to find sufficient sureties to keep the peace, which was the imprisonment in the declaration mentioned; and that the said prosecution ended and determined by reason of the expiration of six calendar months, and not otherwise.

The plaintiff demurred to this plea, the ground of demurrer stated in the margin being "that the defendant's success in his application for surety of the peace does not show that his proceeding was not malicious and without probable cause, nor bars the plaintiff's right of action under such wrongful proceeding." Joinder.

David Keane, in support of the demurrer.—The plea is clearly bad. The fact of the defendant's application to the magistrate being granted does not show that his proceeding was not malicious and without reasonable or probable cause; for if the articles or information laid before him are sufficient in themselves, and the applicant pledges his oath to the truth of the statements therein, the magistrate has no discretion. A precedent for a declaration of this sort is to be found in 2 Chitty on Pleading, 7th edit., by Greening, p. 444. In general, to support an action for a malicious prosecution, it must be shown that the charge was false, and made maliciously and without reasonable or probable cause, and that the plaintiff thereby sustained injury, and, further, *that the prosecution terminated in favour of the plaintiff, or that it was abandoned.* But this last is only necessary where the proceeding is of such a nature that the party had an opportunity of defending himself against it: the rule does not apply where the proceeding is ex parte. The
*194] earliest authority for *an action of this sort is to be found in Rolle's Abridgment, *Action sur Case* (C), "En Courts of Justice," pl. 1, where it is said, "Si A. exhibit faux articles al un Master del Chancerie vers B. sur que B. est lie al good behaviour, B. avera action

sur le case vers A. pur cest deceit et vexacion. Pasch. 17 Jac. B., enter Allen & son feme, plaintiffs, and Gomersall, defendant, adjudge per totam curiam: Mich. 17 Jac. B., enter Bradley and Jones, adjudge."(a) The Writ de Securitate Pacis * "lieth when a man is in fear or doubt that another will beat or assault him, and lieth properly [*195 where one man doth threaten another man to kill, beat, or assault him; then may he come into the Chancery, and pray to have such a writ unto the sheriff:" Fitz. N. B. 79, where the forms of the writ and attachment are given. [ERLE, C. J.—An action lies for maliciously holding a man to bail. There is no judgment of any tribunal there; and therefore an action lies if the party falsely swears that which enables him to arrest the plaintiff. The statute 34 Edw. 3, c. 1, creating justices of the peace, constitutes them a judicial tribunal.] In cases of this sort they do not judge of the truth of the matters alleged before them. In an action for maliciously holding the plaintiff to bail, before the statute 1 & 2 Vict. c. 110, the record would show whether or not there was probable cause for the arrest: but, since that statute, the record furnishes no means of ascertaining whether or not the party was in such a position as to warrant the application for the judge's order. In Daniels *v.* Fielding, 16 M. & W. 200, 206,† Rolfe, B., says: "The foundation on which such an action must now rest, is, that the party obtaining the capias has imposed on the judge by some false statement, some suggestio falsi or suppressio veri, and has thereby satisfied him, not only of the existence of the debt to the requisite amount, but also that there is reasonable ground for supposing the debtor is about to quit the country. But, how will it be, if, without any such fraud or falsehood, a plaintiff, upon an affidavit fairly stating the *facts, succeeds in [*196 satisfying a judge that the defendant is about to quit the country, and so obtains an order for a capias to arrest the defendant, even though he may not himself believe that the defendant does intend to leave the country? If, indeed, the party arrested had not such intention, he has the power, under s. 6, of making a substantive application

(a) Translated, Viner's Abridgment, *Actions* [for Words], (C. a.), pl. 1; in the margin of which reference is made to the case of Bradley *v.* Jones in Godbold 240. In an action upon the case, the case was that the defendant did exhibit articles against the plaintiff in the Chancery before Dr. Cary, and there swore the articles; and afterwards he sued in the King's Bench, and had process out of that court upon the articles sworn in Chancery; and for this an action upon the case was brought, and it was adjudged that the action would lie. The articles exhibited in the Chancery were, that the plaintiff, being an attorney at law was a mainteinor of juries and causes, and a barretor; and the defendant prayed the peace against him in the King's Bench. And in this case it was resolved,—1. That a man might pray the peace or good behaviour of any other man in any of the King's courts; but then it must be done in due form of law; and, if he do it so, no action upon the case will lie, as it was resolved 27 Eliz., in Cutler & Dixon's Case, in the King's Bench. But it was agreed, that, if a man sueth in a court which hath not jurisdiction of the cause, an action upon the case will lie, but not where the court hath jurisdiction of the cause. 2. It was resolved that the action did lie in the case at Bar, because he did exhibit the articles in Chancery, and did not pursue them there: for, when he had sworn the articles in the Chancery, he could not have a supplicavit out of the King's Bench; and the oath and affidavit in the Chancery doth remain as a scandal upon record. 3. It was resolved, that, when a thing doth concern the commonwealth, the same doth concern every one in particular. And so it is lawful for any man to require the good behaviour of another, for the public good: Interest etenim reipublicæ ut malificia puniantur. 4. It was resolved that the action did lie, because the defendant made the articles in Chancery but a colour of the good behaviour: and, although that the King's Bench might grant the good behaviour without any articles preferred, yet, when first they begin in another court, they ought to follow the cause there."

to a judge or to the court, praying to be discharged out of custody; and this will be done as a matter of course, if the party arrested succeeds in satisfying the judge or court that he has not nor ever had the intention imputed to him. But such discharge affords no ground of action against the party at whose instance the party discharged has been held to bail, provided only that the original order of the judge has been fairly obtained. It is essential, under the present statute, that the plaintiff in an action for a malicious arrest should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought, therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the judge has been misled." But, in a proceeding of this nature, the magistrate can go into no inquiry as to the truth of the allegations made before him: no examination or explanation is admissible, unless the threats are ambiguous in their character. The subject is discussed at length in Dalton's Country Justice, c. 116, p. 267, and also in Burn's Justice, title *Surety of the Peace.* In Dalton, p. 269, it is said: "If the justice of the peace shall perceive that this surety for the peace is demanded merely of malice, or for vexation only, without any just cause of fear, he may safely deny it. As in common experience we find it, that, where A. shall upon just cause come before the justice, B. likewise
*197] will crave the peace *against A. (and will perhaps surmise some cause), but yet will nevertheless be content to surcease his suit and demand against A., so as A. will relinquish to have the peace against him: here the justice shall do well (as I think) not to be too forward in granting the peace thus required by B., but to persuade him, and to show him the danger of his oath which he is to take; but yet, if B. will not be persuaded, but will take his oath that he is in fear (where indeed he neither doth fear nor hath cause to fear), this oath shall discharge the justice, and the fault shall remain upon such complainant." A binding to the good behaviour is not by way of punishment, but it is to show, that, when one has broke the good behaviour, he is not to be trusted: per Holt, C. J., Trin. 1 Annæ, B. R. Farr. 29, in the case of The Queen *v.* Rogers, Vin. Abr. *Good Behaviour* (A). That a person against whom articles of the peace are exhibited, is not entitled to controvert that which is sworn against him, is clear from Lord Vane's Case, 13 East 171, n., The King *v.* Doherty, 13 East 171, The Queen *v.* Tregarthen, 5 B. & Ad. 678 (E. C. L. R. vol. 27), The Queen *v.* Dunn, 12 Ad. & E. 599 (E. C. L. R. vol. 40), 4 P. & D. 415, and The Queen *v.* Mallinson, 16 Q. B. 367 (E. C. L. R. vol. 71).(*a*) In Venafra *v.* Johnson, 10 Bingh. 301 (E. C. L. R. vol. 25), 3 M. & Scott 847 (E. C. L. R. vol. 30), which was an action against the defendant for taking the plaintiff to a police office, and causing him to be imprisoned without reasonable or probable cause, on a charge that he had uttered menaces against the defendant's life,—a new trial was directed on the ground that it was not for the judge alone to determine whether the menaces justified the charge, but that it should have been left to the jury to determine whether the defendant believed the menaces, before the judge
*198] decided whether or not there was *reasonable and probable cause for the charge: but it was never doubted that the action would

(*a*) See The King *v.* Parnell, 2 Burr. 806.

lie; and, on the second trial, the plaintiff obtained a verdict with 100*l.* damages: see 6 Car. & P. 50.

Couch, contrà.(*a*)—This action is really without precedent. Venafra *v.* Johnson, which is the only authority that at all approaches the present case, was the ordinary case of an action for maliciously preferring a false charge against the plaintiff, which the defendant failed to appear at the sessions to substantiate. That clearly is no authority for the maintenance of an action like this. So, in the case put in Rolle's Abridgment, it does not appear that the falsity of the articles had not been ascertained by indictment for perjury. In Comyns's Digest, *Action upon the Case for Misfeasance* (A. 6), it is said that an action upon the case lies for any malicious act to the damage of another,—as, "if a man malitiosè take a false oath before a committee, whereby the plaintiff is damaged: but, whether it lies before a conviction for this, dub. Broad *v.* Hancock, 1 Sid. 50." In Eyres *v.* Sedgewicke, Cro. Jac. 601, which was an action on the case for that the defendant made a false affidavit in Chancery that the plaintiff made a rescue, by reason of which false oath the plaintiff was imprisoned and put to great expense,—it was moved in arrest of judgment, "that this action lies not; for, when any one takes an oath in a court, the court always presumes it to be true until his oath is disproved, and he be convicted of perjury by indictment, or censure in the Star-Chamber, or [*199 *otherwise, and not in an action upon the case; for, it would be mischievous if the truth or falsehood of an oath should be tried by action upon the case. And as to that point was cited 21 Ass., that action upon the case lies not against an indictor, for that he did it upon his oath: and the case of Damport *v.* Sympson, in the Common Pleas (Cro. Eliz. 520), where it was resolved, that, where an action upon the case was brought against the defendant, supposing that he gave false testimony concerning the value of a jewel, judgment was that the action lay not, for then every one should be drawn in question by actions upon the case, which would be inconvenient." The court assented to that argument, and held that the action would not lie.(*b*) In Reynolds *v.* Kennedy, 1 Wils. 232, it was held, that, if the condemnation of goods for not entering and paying duty, by sub-commissioners, be reversed by the commissioners of appeal in Ireland, an action for a malicious prosecution does not lie against the informer; for, *the judgment of the sub-commissioner shows there was a foundation for the information and prosecution*. In Whitworth *v.* Hall, 2 B. & Ad. 695 (E. C. L. R. vol. 22), where it was held, that, in an action for maliciously suing out a commission of bankrupt, it must be averred and proved that the commission was superseded before the commencement of the action, Parke, J., says,—"It seems to be involved in the proposition that the commission was sued out without reasonable and probable cause, that such commission must be superseded before the action be commenced;

(*a*) The points marked for argument on the part of the defendant, were,—"That the declaration is bad for not showing that the plaintiff is entitled to sue; and that, as appears from the plea, the proceeding complained of in the declaration did not terminate in the plaintiff's favour."

(*b*) Montague, C. J., and Doderidge and Chamberlain, JJ.; but Houghton, J., held the contrary,—"for, being averred to be false, the action is well maintainable, for he is damnified by that false oath; and there is not any reason he should be without remedy."

*200] for, the very existence of the commission would be some *evidence of probable cause." So, in Mellor v. Baddeley, 2 C. & M. 675,† 4 Tyrwh. 962, where, in an action on the case against a party for maliciously and without probable cause causing an information to be laid against the plaintiff for trespassing on land in pursuit of game, in the day-time, under stat. 1 & 2 W. 4, c. 32, and thereby causing him to be convicted and imprisoned by a justice of the peace, the plaintiff did not appeal against the conviction pursuant to the 44th section of that statute, but suffered the imprisonment under the conviction, and the conviction was still subsisting,—it was held that the action was not maintainable. In giving judgment, the court say,—"We are of opinion, that, to support this action, it was necessary that there should have been proof of a prosecution which had been discharged and put an end to, and also of want of probable cause, and a damage sustained in consequence of the prosecution." [ERLE, C. J.—If you show that the magistrates here acted judicially, deciding between the parties, you advance your argument a long way.] In Buller's Nisi Prius 12, it is said, that, "If a man sue me in a proper court, yet if his suit be utterly without ground of truth, *and that certainly known to himself*, I may have case against him for the undue vexation and damage that he putteth me unto by his ill practice. But two cautions are to be observed to maintain actions in these cases,—1. The new action must not be brought before the first be determined, because till then it cannot appear that the first was unjust: Farel v. Nun, B. R., T. 5 G. 3; Lewis v. Farrel, 1 Stra. 114,—2. That there must be not only a thing done amiss, but also a damage either already fallen upon the party, or else inevitable; and therefore, if a man forge a bond in my name, I can have no action till I am sued upon it." In Morgan v. Hughes,

*201] 2 T. R. 225, 231, Buller, J., says: "The *grounds of a malicious prosecution are,—first, that it was done maliciously,—and, secondly, without probable cause. The want of probable cause is the gist of the action: but that is not stated here; for, it should have been shown on the face of the record that the prosecution was at an end. Saying that the plaintiff was 'discharged' is not sufficient: it is not equal to the word 'acquitted,' which has a definite meaning. Where the word 'acquitted' is used, it must be understood in the legal sense, viz. by a jury on the trial. But there are various ways by which a man may be discharged from his imprisonment, without putting an end to the suit. If, indeed, it had been alleged that he was discharged by the grand jury's not finding the bill, that would have shown a legal end to the prosecution. Neither is there any distinction between a malicious commitment and a malicious prosecution. The present is more like the case of an action for maliciously holding to bail than any other; in which case it must be shown that there is an end to the suit." Norrish v. Richards, 3 Ad. & E. 733 (E. C. L. R. vol. 30), 5 Nev. & M. 268, is an authority to the same effect. It was there held that proof that a plaintiff had not declared in an action removed by habeas corpus within two terms, is not sufficient evidence of a determination of the suit to support an action for malicious arrest. [WILLIAMS, J.—I observe in that case, that, upon Wilkinson v. Howel, M. & M. 495 (E. C. L. R. vol. 22), being cited, where it was held, that, to support an action for a malicious arrest, it must appear from the mode in which the first suit

terminated that it had no foundation,—Patteson, J., says: "A stet processus, by which the suit was ended in Wilkinson *v.* Howel, would not only be no evidence that the suit was without foundation, but would be primâ facie evidence the other way, the suit being thus concluded by consent of the parties."] There is a manifest distinction between *a proceeding of this kind, where the party merely goes before the magistrate and makes a complaint vivâ voce, and the more formal proceeding of exhibiting articles of the peace. All the cases cited are of proceedings of the latter description. [ERLE, C. J.—In Burn's Justice, *Surety of the Peace*, § IV., it is said that "A person demanding sureties of the peace (whether it be in the first instance before a single justice for immediate security, or by exhibiting articles before the justices in session) swears only to his own apprehensions, of which no other person can form an adequate judgment; from which it has been deduced by the judges, in many cases, as a general rule, that articles of the peace cannot be resisted on any ground, except by showing *direct* evidence of express malice; such as, declarations to that effect; but not *inferred* malice, collected from general reasoning or collateral circumstances: and, moreover, that, whenever *particular facts* of violence are stated by the complainant, it is not permitted for the defendant to controvert them; for, they must be taken to be true, till negatived through the medium of an appropriate prosecution." And for this are cited The Queen *v.* Dunn, 12 Ad. & E. 599 (E. C. L. R. vol. 40), 4 P. & D. 415, and The King *v.* Stanhope, 12 Ad. & E. 620, n. If the matter is controvertible, Mr. *Keane's* argument fails. Is it clear that the magistrate could hear the plaintiff when brought before him?] The passage cited from Dalton's Justice shows that the magistrate has some discretion. [ERLE, C. J.—The case of Venafra *v.* Johnson, 10 Bingh. 301 (E. C. L. R. vol. 25), 3 M. & Scott 847 (E. C. L. R. vol. 30), seems to me to be precisely in point.] It is submitted that the action is not maintainable, unless it can be brought within the rule as to actions for malicious prosecutions, which is, that the plaintiff must allege and prove such a termination of the proceeding as to show that it was brought maliciously and *without reasonable or probable cause. [CROWDER, J.—Have you any authority for saying that there is a difference between a summary application of this sort and the more formal proceeding by articles?] No case has been found: but the two modes of proceeding are not analogous: if the magistrate declines to interfere, the party may still go to the sessions.

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Keane was not heard in reply.

ERLE, C. J.—I am of opinion that our judgment in this case must be for the plaintiff. It is an action against the defendant for falsely and maliciously, and without reasonable or probable cause, making information on oath before a magistrate that the plaintiff had used threatening language to him, whereby he went in fear of bodily harm, and so procuring a warrant under which the plaintiff was incarcerated in the castle at Swaffham, for want of sureties, for a period of six months. It is admitted on the pleadings that the defendant did falsely and maliciously, and without reasonable or probable cause, procure that wrong to be done to the plaintiff; and the question is whether the declaration shows enough to entitle the plaintiff to maintain an action for that wrong. This is in some sort an action for a malicious prosecution; and it has

been contended by Mr. *Couch*, for the defendant, that the case falls within the ordinary rule applicable to such actions, that the plaintiff must show that the proceeding terminated in his favour, and that no action lies where they are shown to have terminated against the accused. But I am of opinion that the distinction taken by Mr. *Keane* removes that objection, and shows that that rule does not apply to this case, because the proceeding before the magistrate being founded upon a statement *204] which the party charged is not at liberty to *controvert, is an ex parte proceeding, and, although it attains the result which is sought, it is not a judgment, but is in the nature of a writ or process. It is not like the case of an application to a magistrate upon a matter on which he is to exercise his discretion: there, the injury sustained by the party is the act of the law, and therefore no action lies unless the person who sets the magistrate in motion is actuated by malice. But here the law was directly put in motion by the defendant against the plaintiff, and, it must be assumed, falsely and maliciously and without reasonable or probable cause. If a party goes before a judge, under the 1 & 2 Vict. c. 110, with an affidavit of debt for the purpose of procuring a capias to arrest his debtor, upon a suggestion that he is going abroad, and that is done falsely and maliciously, and without reasonable or probable cause, an action lies. So, if a party go to the Court of Queen's Bench, and maliciously exhibit articles of the peace against another, supported by a false oath that such other had used threats against him, his statement being incontrovertible, it is clear to my mind that an action would lie. Can it make any difference that here the proceeding took place before a magistrate? It seems to me that the two proceedings are quite analogous: the same remedy is sought, only by a different mode. As in the one case the truth of the articles cannot be controverted, so in the other the statement made before the magistrate upon oath cannot be contradicted by the accused. There is not the least sign of authority to show that the magistrate had any discretion, so that the plaintiff might have had a decision in his favour. In Burn's Justice, sureties of the peace are treated as being subject to precisely the same rule as articles of the peace at the sessions or in the Court of Queen's Bench, in respect of their truth being incontrovertible. And *205] there is strong *reason for assuming that to be the true state of the law; the fact of there being no authority exactly in point as to sureties of the peace, may well be accounted for by supposing that no one has entertained doubt enough upon it to take the opinion of any court. But as far as authority goes, The King *v.* Doherty, 13 East 171, and Venafra *v.* Johnson, 10 Bingh. 301, 3 M. & Scott 847, are in favour of the plaintiff. In the latter case, Johnson made precisely the same application to the justices as was made here, and they exercised a precisely analogous jurisdiction, the only difference being that there the magistrates held the plaintiff to bail for his appearance at the sessions, whereas here the magistrate at once committed the plaintiff to gaol until he should find the required sureties: and it was there decided by implication that the proceeding before the magistrate was incontrovertible; for, the court held that the judge was wrong in not leaving it to the jury to say whether or not the defendant believed the menaces when he put the law in motion against the plaintiff. If Mr. *Couch's* argument to-day is right, the counsel and the court in that case were all wrong.

Upon principle, therefore, and upon authority, it seems to me that the argument for the plaintiff in this case ought to prevail.

WILLIAMS, J.—I am of the same opinion. This is an action for maliciously and without reasonable or probable cause procuring certain magistrates to commit the plaintiff to gaol until he found sureties of the peace. It is not and could not be contended that the action was not maintainable provided the plaintiff duly complied with the rule as stated in the notes to Stennel *v.* Hogg, 1 Wms. Saund. 228 *a*, n. (*f*), and by Parke, J., in Whitworth *v.* Hall, 2 B. & Ad. 695 (E. C. L. R. vol. 22), and by the Court of Exchequer in Mellor *v.* Baddeley, 2 *C. & M. 675,† 4 Tyrw. 962, by alleging that the proceeding which he [*206 alleges to have been maliciously taken terminated in his favour. The question is whether that rule applies to a case of this sort. In the case of the exhibiting of articles of the peace,—which it seems to me is strictly analogous to the less formal proceeding before the magistrates out of sessions,—the authorities show that the matter could not terminate in favour of the plaintiff, because he is not at liberty to controvert the statement made against him; and therefore it is impossible to say that the existence of the proceedings, and the fact that they have not terminated favourably to the plaintiff, is any evidence that there was reasonable or probable cause for instituting them. The authorities show that the magistrates are bound to act upon the statement made to them, and do not exercise any judicial functions at all. And there seems to be no distinction in this respect between a proceeding to obtain sureties for good behaviour and the more formal proceeding by exhibiting articles of the peace at the sessions. That being so, it is clear that the rule to which I have adverted is not applicable on the present occasion, but that this action may be maintained without showing a termination of the proceedings before the magistrates favourable to the plaintiff.

CROWDER, J.—I am of the same opinion. The main question to be considered, is, whether the charge, which is alleged to have been made maliciously and without reasonable or probable cause, was one which might have been controverted before the magistrates; for, if it could be controverted, the authorities show that the plaintiff must allege and prove that the proceeding terminated in his favour. In order to make that rule applicable, the defendant was bound to make out that the plaintiff had an opportunity of contesting the matter before the magistrates, and so getting a *determination in his favour. It appears [*207 to me that the defendant has failed in this. If this had been the case of articles of the peace exhibited against the plaintiff at the sessions, the authorities show beyond a doubt that the accused would not be allowed to say anything in his defence. In that case, it clearly could not be necessary to allege that the proceeding terminated in the plaintiff's favour, because it necessarily must terminate either in the accused finding sureties or going to prison. Is there, then, any distinction, as far as concerns this question, between an application for sureties of the peace or recognisances for good behaviour, and articles of the peace? No authority has been cited to show that there is; and, if any had existed, the industry of the learned counsel for the defendant would doubtless have discovered it. The absence of any distinct authority induces me to think that there is no distinction: and this notion is fortified by the passage which my Lord cited from Burn's Justice, which treats the two

proceedings as analogous. That being so, I think it was quite unnecessary for the plaintiff to allege in his declaration that the proceedings before the magistrates terminated in his favour. I therefore think the action is maintainable, and that the plaintiff is entitled to judgment.

BYLES, J.—I am of the same opinion. The only objection which has been urged against the maintenance of this action, is, that the inquiry before the magistrates appears to have terminated unfavourably for the plaintiff. Whether the proceeding was of a judicial nature or not depends upon whether or not the plaintiff had an opportunity of being heard before the magistrates in answer to the charge. No direct authority has been cited to show that he had; but two faint traces of authority in support of the affirmative have *been shown,—one, the assertion made by Mr. *Marryatt* in The King *v.* Doherty, 13 East 171, which does not seem to be warranted by the authorities cited, and the passage in Dalton's Justice, c. 116, to the effect that the magistrate has a discretion in the matter. There certainly seems to be no good reason why the magistrate should not receive information from the defendant as well as from the plaintiff. But the question is whether the plaintiff had a right to be heard to controvert the statement made against him upon oath. Upon the authorities, it seems clear that he had not. It was an ex parte proceeding: but I am not disposed to admit that the action would not have been maintainable even if the plaintiff had an opportunity of defending himself, and of controverting that which was alleged against him. Under the statute 1 & 2 Vict. c. 110, the judge does not allow a capias as a matter of course; and yet it has been held that an action lies against a party for maliciously and without reasonable and probable cause procuring a capias to be issued against the plaintiff, although he has a right to come before the judge to show cause why the writ should not issue. It is unnecessary, however, to express any opinion on that. There are two authorities in this court, viz. the passage in Rolle's Abridgment (translated in Viner), and the case of Venafra *v.* Johnson, which are precisely in point. I quite agree with my Lord that the case of Venafra *v.* Johnson is not distinguishable in principle from this case. The proceeding in question is of a very summary nature, and is often adopted in the absence of the party accused. There is some check against false swearing in the liability of the accused to be indicted for perjury: but his oath before the magistrate is incontrovertible. On principle, therefore, as well as on authority, it seems to me that the action is maintainable.

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Judgment for the plaintiff.

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*209] *DUNNICLIFF and BAGLEY *v.* MALLET. DUNNICLIFF and BAGLEY *v.* BIRKIN and Another. *Nov.* 14.

It is competent to the assignee of a separate and distinct portion of a patent to sue for an infringement of that part, without joining one who has an interest in another part,—the damages to be recovered in the action accruing to the former alone.

THESE were actions brought by the plaintiffs for alleged infringements by the defendants of a patent for "Improvements in lace and other weavings."

The declaration in the first action stated that the plaintiffs were the first and true inventors of a certain new manufacture, that is to say, of certain improvements in lace and other weavings; and thereupon Her Majesty Queen Victoria, by letters patent duly sealed in that behalf, to wit, under the Great Seal of the United Kingdom of Great Britain and Ireland, granted to the said plaintiffs, their executors, administrators, and assigns, the sole privilege to make, use, exercise, and vend the said invention within England for the term of fourteen years from the 11th of June, 1850, subject to a condition that the said plaintiffs should within six calendar months next after the date of the said letters patent cause to be enrolled in the High Court of Chancery an instrument in writing under their hands and seals particularly describing and ascertaining the nature of their said invention and in what manner the same was to be performed: That the plaintiffs did within the term prescribed fulfil the said condition: That afterwards, and before the committing of the infringements thereinafter complained of, by an indenture, dated the 27th of March, 1851, and made between John Woodhouse Bagley of the one part, and John Dearman Dunnicliff of the other part, the said John Woodhouse Bagley did grant, bargain, sell, assign, transfer, and set over unto the said John Dearman Dunnicliff, his executors, administrators, and assigns, All the share and interest of him the said John *Woodhouse Bagley of and in the said letters patent so far as [*210 the same related to the invention of manufacturing warp fabrics, with all the powers, privileges, and authorities granted or secured by the said letters patent in respect of the same; and also so much of the said invention as applied to warp fabrics, and all benefit and advantage to be had or derived therefrom, with all the right, title, interest, property, claim, and demand whatsoever of him the said John Woodhouse Bagley of, in, to, or in respect of the same: and by the same indenture the said John Dearman Dunnicliff did grant, bargain, sell, assign, transfer, and set over unto the said John Woodhouse Bagley, his executors, administrators, and assigns, All the share and interest of him the said John Dearman Dunnicliff of and in the said letters patent so far as the same related to the manufacturing of the fabrics known as purles, with all the powers, privileges, and authorities granted or secured by the said letters patent in respect of the same; and also so much of the said invention as applied to the manufacturing of the said fabrics called purles as aforesaid, and all benefit and advantage to be had or derived therefrom, with all the right, title, interest, property, claim, and demand whatsoever of him the said John Dearman Dunnicliff of, in, to, or in respect of the same, or to any part thereof: That, afterwards, and after the execution of the said indenture, and before the committing of the infringements thereinafter complained of, by another indenture, dated the 22d of August, 1851, between the said John Dearman Dunnicliff of the one part, and Thomas Ball, John Ball, William Ball, and the said John Dearman Dunnicliff, of the other part, the said John Dearman Dunnicliff did grant, bargain, sell, assign, transfer, and set over unto the said Thomas Ball, John Ball, William Ball, and John Dearman Dunnicliff (being the firm of Ball, Dunnicliff & *Co.), All and [*211 singular the share and interest of him the said John Dearman Dunnicliff of and in the said letters patent so granted to the said John Dearman Dunnicliff and John Woodhouse Bagley, their executors,

administrators, and assigns, as aforesaid; and also all and singular the share and interest of him the said John Dearman Dunnicliff of and in the aforesaid invention, with all and singular the powers, privileges, and authorities granted or secured by the said letters patent and the said indenture of the 27th of March, 1851, thereinbefore stated, together with every right, title, interest, advantage, claim, and demand of him the said John Dearman Dunnicliff to be had or derived under the said letters patent or the said indenture of the 27th of March, 1851, thereinbefore stated, or both or either of them: That, afterwards, and after the execution of the said last-mentioned indenture, and before the committing of the infringements thereinafter complained of, by another indenture, dated the 16th of May, 1853, between the said John Dearman Dunnicliff of the one part, and the said Thomas Ball, John Ball, and William Ball, of the other part, the said John Dearman Dunnicliff did assign, transfer, and set over unto the said Thomas Ball, John Ball, and William Ball, their executors, administrators, and assigns, All that and all those the rights, shares, and interest of him the said John Dearman Dunnicliff of and in the said letters patent, and all and singular the powers, authorities, liberties, privileges, profits, emoluments, and advantages whatsoever appertaining or belonging thereto, or in anywise to be had or made therefrom, and all the estate, right, title, interest, term and terms of years, benefit, property, claim, and demand whatsoever, at law or in equity, of him the said John Dearman Dunnicliff of, in, to, out of, or upon the said premises thereby assigned or expressed or intended so to be, *and every part thereof: That, afterwards, and after the execution of the last-mentioned indenture, and before the committing of the infringements thereinafter complained of, by another indenture, dated the 24th of December, 1858, and made between the said John Ball of the one part, and the said Thomas Ball and William Ball of the other part, the said John Ball did (amongst other things) assign unto the said Thomas Ball and William Ball, their executors, administrators, and assigns, All the share and interest of him the said John Ball of and in the said letters patent and invention so granted as aforesaid: That, afterwards, and after the execution of the said last-mentioned indenture, and before the committing of the infringements thereinafter complained of, by another indenture, dated the 30th of December, 1858, and made between the said Thomas Ball and William Ball of the first part, the said John Woodhouse Bagley of the second part, and the said John Dearman Dunnicliff of the third part, the said Thomas Ball and William Ball, with the privity and approbation of the said John Woodhouse Bagley (testified by his being a party to and executing the now stating indenture), did, and each of them did, grant, assign, and transfer unto the said John Dearman Dunnicliff, his executors, administrators, and assigns, All and singular the share and interest of them the said Thomas Ball and William Ball of and in so much of the said letters patent and invention so far as the same related to or concerned the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purle edges of lace, and other weavings in twist lace machines as described in the sixth part of the specification duly enrolled or filed of the said invention for which the said letters patent had been

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granted as aforesaid, with all *and singular the rights, privileges, [*213
and authorities, emoluments, benefits, and advantages granted or
secured by the letters patent in respect of the same, or to be derived
therefrom, with the like benefit of any renewed letters patent to be
obtained for or in respect of so much of the said invention as was
thereby assigned, and all the right, title, interest, term and terms of
years, benefit, property, advantage, claim, and demand whatsoever of
the said Thomas Ball and William Ball, or either of them, in, to, of, or
upon so much of the said invention and letters patent and premises as
was thereby assigned,—all of which several assignments that are dated
after the 1st of October, 1852, were duly entered in the book intituled
"The Register of Proprietors," according to and as required by the act
of parliament made in the session holden in the fifteenth and sixteenth
years of the reign of Her said Majesty intituled "An act for amending
the law for granting patents for inventions (15 & 16 Vict. c. 83);" and
the others of the said assignments were made before the passing of that
act: That, by virtue of the several premises, the said patent right, so
far as it related or relates to or concerned or concerns certain matters,
viz. the making, using, exercising, and vending of the said invention of
improvements in the manufacture of close weavings in lace, and of
twisted purle edges of lace, and other weavings in twist lace machines,
as described in the sixth part of the said specification, before the com-
mitting of the infringements thereinafter complained of vested in the
plaintiffs,—the matters aforesaid being matters which the said patent
right did and does relate to and concern: Yet that the defendant during
the said term, and after the execution of the said last-mentioned inden-
ture, and while the said patent right, so far as aforesaid, was vested in
the plaintiffs as aforesaid, did infringe the *said patent right of [*214
the plaintiffs so far as the same related or relates to or concerned
or concerns the making, using, exercising, and vending of the said inven-
tion of improvements in the manufacture of close weavings in lace, and
of twisted purle edges of lace, and other weavings in twist lace machines
as described in the sixth part of the said specification. And the plain-
tiffs claimed 1000*l.*, as also a writ of injunction to restrain the defend-
ant from the repetition and continuance of the said injury and the com-
mittal of any injury of the like kind by the defendant relating to the
said patent right; and the plaintiffs also prayed that an account might
be kept and taken of all profits which had been or which during the
pendency of the suit might be made or obtained by the defendant by
the infringement of the said patent right, and that the defendant might
be by the court here ordered and compelled to pay the amount of all
such profits to the plaintiffs.

The defendant pleaded that the said supposed invention in the decla-
ration mentioned consists of and comprises, and the said supposed
letters patent and sole privilege relate to, the making, using, exercising,
and vending, as well the said warp fabrics, and the said fabrics known
as purles, and improvements in the manufacture of close weavings in
lace, and twisted purle edges of lace, and other weavings in twist lace
machines, in the declaration mentioned, as also the manufacture of
double lace and other weavings in twist lace machines, described in the
said supposed specification, and the sole privilege of making, using, exer-
cising, and vending of which was not comprised in or assigned by the

said supposed indenture in the declaration firstly mentioned, and was not comprised in or assigned by the said supposed indenture in the declaration lastly mentioned: And that each of them the said Thomas Ball and
*215] William Ball, at the time of the *commencement of this suit, was and still is living: And this the defendant was ready to verify; wherefore, because the said Thomas Ball and William Ball had not and were not, nor had nor was either of them, joined in the said writ and declaration, the defendant prayed judgment of the said writ and declaration, and that the same might be quashed, &c.

The plaintiffs demurred to this plea; the grounds of demurrer stated in the margin being, "that the plea does not show that the Balls are interested in that part of the patent the infringement of which is complained of in the declaration; that the plea does not show an interest in the Balls at the time of the infringement; and that the Balls might have assigned to a stranger before the infringement, and then the plea would be true, although the Balls ought not to be joined."

Joinder in demurrer.

In the second action of Dunnicliff *v.* Birkin, the declaration was the same as in the action against Mallet. The plea also was the same, with the addition of an averment "that, at the time of the said supposed infringements by the defendants of the said supposed patent right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters patent and patent right to them assigned as in the declaration mentioned."

The plaintiffs joined issue on so much of the above plea as alleged that at the time of the said supposed infringement by the defendants of the said supposed right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters patent right to them assigned as in the declaration mentioned.

*216] *To this replication the defendants demurred, the ground stated in the margin being, that "the replication takes issue upon an immaterial averment in the plea, and admits allegations sufficient to entitle the defendants to judgment." Joinder.

Hayes, Serjt. (with whom was *Mellish*), for the plaintiffs.(*a*)—The declaration alleges a grant to the plaintiffs of a patent for certain improvements in lace and other weavings. It then states that Bagley, by indenture of the 27th of March, 1851, assigned to Dunnicliff all his

(*a*) The points marked for argument on the part of the plaintiffs in Dunnicliff v. Mallet, were as follows:—

"The plea does not show that the Balls had any interest in that part of the invention which was infringed: and, where an invention is divided into distinct parts, and one party is solely interested in one part, and another in another, if the part of the former is infringed, it is not necessary that the latter, who has no interest in it, should join:

"The plea does not show with certainty that the Balls had any interest in any part of the invention at the time of the infringement:

"A traverse of the plea would not raise the question as to who were interested in the patent at the time of the infringement:

"The plea is true, if the Balls never executed the last-mentioned indenture at all, and upon a traverse would be supported by proof of that fact; therefore, it leaves it uncertain whether Dunnicliff should or should not be joined in the new writ, if the present writ is quashed:

"The plea is altogether too vague for a plea in abatement, which requires great certainty."

share in the patent *so far as the same related to the invention of manufacturing warp fabrics;* that, by indenture of the 22d of August, 1851, Dunnicliff assigned all his share and interest in the patent, as well under the original grant as under the assignment of the 27th of March, 1851, to Thomas Ball, John *Ball, William Ball, and himself (being the firm of Ball, Dunnicliff & Co.); that, by indenture of the [*217 16th of May, 1853, Dunnicliff assigned to the Balls all his share and interest in the patent; that, by indenture of the 24th of December, 1858, John Ball assigned to Thomas and William Ball all his interest in the patent; and that, by indenture of the 30th of December, 1858, between Thomas and William Ball of the first part, Bagley of the second part, and Dunnicliff of the third part, the two Balls, with the privity and approbation of Bagley, assigned to Dunnicliff all their share and interest "of and in so much of the said letters patent and invention as related to or concerned the making, using, exercising, and vending of the said invention of *improvements in the manufacture of close weavings in lace, and of twisted purle edges of lace, and other weavings in twist lace machines, as described in the sixth part of the specification.*" The declaration then proceeds to allege, that, by virtue of the premises, "the said patent right, so far as it related or relates to or concerned or concerns certain matters, viz., the making, using, exercising, and vending of the said invention of *improvements in the manufacture of close weavings in lace, and of twisted purle edges of lace, and other weavings in twist lace machines, as described in the sixth part of the said specification*, before the committing of the infringements thereinafter complained of, vested in the plaintiffs." And then it alleges that the defendants, after the execution of the last-mentioned indenture, and while the said patent right so far as aforesaid was vested in the plaintiffs as aforesaid, infringed the said patent right of the plaintiffs "so far as the same related or relates to, or concerned or concerns, the making, using, exercising, and vending of the said invention of *improvements in the manufacture of close weavings in *lace, and of twisted purle edges of [*218 lace, and other weavings in twist lace machines, as described in the sixth part of the said specification.*" To this declaration the defendants plead in abatement the non-joinder of Thomas and William Ball. Now, as there was no joint damage to the plaintiffs and the two Balls from the infringements here complained of, there can be no reason for joining them in the action. That a patent is a divisible thing, and assignable, seems to be admitted by the plea. Originally, there was no limitation of the number of persons to whom a patent might be assigned. A limit was subsequently imposed of five, ultimately increased to twelve: and that limit was repealed by the 36th section of the 15 & 16 Vict. c. 83. [BYLES, J.—Are they joint tenants?] The original patentees would be joint tenants; but the assignees would be tenants in common. There is no authority to show that a patent which is per se capable of being divided may not be assigned in parts. Lord Coke, treating of what inheritances are divisible, says,—Co. Litt. 164 b,—"It is to be considered of what inheritances daughters shall be coparceners, and how and in what manner partition shall be made between them. Wherein it is to be observed, that, of inheritances, some be entire and some be several; again, of entire, some be divisible, and some be indivisible. And here it appeareth by Littleton,

that parceners take their appellation, because they are compelled to make partition by writ of partitione faciendâ; where, note that Littleton alloweth well to find out the true derivation of words, as often hath been and shall be observed. If a villeine descend to two coparceners, this is an entire inheritance; and, albeit the villeine himself cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one week, &c., and the other another day or week, &c.

*219] *And for the same reason a woman shall be endowed of a villeine, as before it appeareth in the chapter of Dower. Likewise, an advowson is an entire inheritance; and yet in effect the same may be divided between coparceners, for they may divide it to present by turns. A rent-charge is entire, and against common right; yet it may be divided between coparceners, and by act in law the tenant of the land is subject to several distresses, and partition may be made before seisin of the rent. Entire inheritances not divisible we find divers in our books; and some inheritances that are divisible, and yet shall not be parted or divided between coparceners, as hereafter shall appear. If a man have reasonable estovers, as housebote, heybote, &c., appendant to his freehold, they are so entire as they shall not be divided between coparceners. So if a corody incertaine be granted to a man and his heirs, and he hath issue divers daughters, this corodie shall not be divided between them: but of a corodie certaine partition may be made. Homage and fealty cannot be divided between coparceners. So, a piscary incertaine, or a common sans nombre, cannot be divided between coparceners, for that would be a charge to the tenant of the soil. The Lord Mountjoy, seised of the manor of Canford in fee, did by deed indented and enrolled bargain and sell the same to Browne in fee, in which indenture this clause was contained,—*Provided alwayes, and the said Browne did covenant and grant to and with the said Lord Mountjoy, his heires and assignes, that the Lord Mountjoy, his heires and assignes, might dig for ore in the lands (which were great wasts) parcell of the said mannor, and to dig turfe also for the making of allome.* And in this case three points were resolved by all the judges,—first, that this did amount to a grant of an interest and inheritance to the Lord Mount-

*220] joy to dig, &c.,—secondly, that, notwithstanding this *grant, Browne, his heires and assignes, might dig also, and like to the case of common sans nombre,—thirdly, that the Lord Mountjoy might assign his whole interest to one, two, or more; but then, if there be two or more, they could make no division of it, but work together with one stocke; neither could the Lord Mountjoy, &c., assign his interest in any part of the wast to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore, if such an incertaine inheritance descendeth to two coparceners, it cannot be divided between them." Thus it appears that inheritances in general may be divided, unless there be some reason of prejudice to others to prevent it. There can be no good reason why a patent for an invention in itself susceptible of division, should not be divided: for instance, suppose a patent were granted for an anchor and a windlass, why should not the patentee assign his interest in the patent so far as regards the anchor, retaining it as regards the windlass? Where the damage is joint, the action must be joint. Tenants in common cannot join in ejectment, but they may join in an action for mesne profits. Littleton,

§ 315, says: "As to actions personals, tenants in common may have such actions personals joyntly in all their names, as, of trespass, or of offences which concerne their tenements in common, as, for breaking their houses, breaking their closes, feeding, wasting, and defowling their grasse, cutting their woods, for fishing in their piscary, and such like. In this case, tenants in common shall have one action jointly, and shall recover joyntly their damages, because the action is in the personalty, and not in the realtie." "For," says Lord Coke, "the trespass and damage done to them was joynt." All the authorities upon the subject are collected in the notes to Coryton *v.* Lithebye, 2 Wms. *Saund. 115; amongst others, the celebrated case of the Tun- [*221 bridge Wells dippers, Weller *v.* Baker, 2 Wils. 423. "That case was, that of these dippers there were only twelve in number, all women, who were chosen by the freeholders of the manor within which the wells lay, and approved of by the lord of the manor; and that the business of a dipper was, to attend the wells, and deliver the water to the company who resorted there, and the employment was attended with profits which arose merely from the voluntary contributions of the company; and the defendant having acted as a dipper without a proper appointment, the dippers joined in an action against her for the disturbance, which was thought by the court to be well brought, because, although the dippers were *severally* entitled to receive for their own several use such voluntary gratuities as the company were pleased to give them respectively, yet, with regard to a stranger's disturbing them in their *employment*, they were all *jointly* concerned in point of interest; and that was a hurt done to them all." In Smith *v.* The London and North-Western Railway Company, 2 Ellis & B. 69 (E. C. L. R. vol. 75), the court applied the same rule to patents as is applied to other matters,—holding, that, where A. and B. are tenants in common of a patent assigned to them, if B. dies, actions for infringements committed in B.'s lifetime survive to A., who is entitled at law to recover the whole damages. Here, only one part of the patent has been infringed, viz., that which is described as the sixth part of the specification. Thomas and William Ball have assigned all their interest in that part to the plaintiffs; they therefore sustain no damage from the infringement. In Wilkinson *v.* Hall, 1 N. C. 713 (E. C. L. R. vol. 27), 1 Scott 675, it was held, that tenants in common cannot sue jointly for double value for holding over, where there has been no joint demise. The plea does not give the plaintiffs a better *writ. It is wanting in certainty, inasmuch as [*222 it does not aver that the interest of the Balls continues: they may have assigned it away.

Hindmarch, for the defendant Mallet.(*a*)—The subject-matter in

(*a*) The points marked for argument on the part of the defendants in Dunnicliff *v.* Mallet, were as follows:—

"That the plea is good, and the defendant is entitled to judgment for the following, amongst other, reasons,—

"That the declaration and plea show that Thomas Ball and William Ball were entitled unto some parts, shares, or interests in the letters patent and privilege mentioned, and that the plaintiff cannot therefore sue alone for any infringement of the patent, and that Thomas Ball and William Ball ought to have joined in bringing the action:

"That, if the supposed infringement mentioned in the declaration has been committed, it was a violation of a privilege entire in its nature, for which all the parties entitled unto the privilege must sue:

"That the patent privilege mentioned in the declaration could not be partitioned or divide

contest is the sole right of making, using, and vending a certain invention. It is a sort of incorporeal right in the nature of a franchise granted to one or more persons. The thing granted is a prohibitory right,—to prohibit all persons except the grantees from using the invention. Now, a franchise is clearly an indivisible thing: it cannot be the subject of partition; nor can it be divided so as to vest a separate and
*223] distinct part of the privilege in one or more *persons. Tenants in common in all real and mixed actions must sever; in personal actions they must join. This is an action relating to personalty. It appears from the pleadings that the patent relates to two different species of manufacture,—the one, the manufacture of warp fabrics; the other, the manufacture of close weavings in lace and of twisted purle edges of lace and other weavings in twist lace machines, as described in the sixth part of the specification. The plea also establishes this, that a portion of the invention consists also of the manufacture of double lace and other weavings in twist lace machines described in the specification, the sole privilege of making, using, exercising, and vending of which was not comprised in or assigned by the indenture in the declaration firstly mentioned (27th March, 1851), and was not comprised in or assigned by the indenture in the declaration lastly mentioned (30th December, 1858). By the first deed, Bagley assigns to Dunnicliff all that relates to warp fabrics. Dunnicliff thus became solely entitled to the invention so far as it related to warp manufactures, and jointly entitled with him in the rest of the patent. By the indentures of the 16th of May, 1853, and 24th of December, 1858, Thomas and William Ball were placed exactly in Dunnicliff's shoes. And by the indenture of the 30th of December, 1858, Thomas and William Ball assign to Dunnicliff all their interest in so much of the patent and invention as related to or concerned the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in lace, and of twisted purle edges of lace and other weavings in twist lace machines, as described in the sixth part of the specification." As to a portion of the invention, therefore, there is a community of interest between Thomas
*224] and William Ball and the plaintiffs. And, if the *declaration leaves the matter in doubt, it is clearly bad. It would be an intolerable hardship on the public, if patent rights could be severed and assigned in severalty to different persons in the way suggested. The only case at all bearing upon the subject is that of Smith *v.* The London and North Western Railway Company, 2 Ellis & B. 69 (E. C. L. R. vol. 75); and there the declaration alleged the assignment to have been to the plaintiff and Willey as tenants in common. The defendant has a right to have all the parties interested in the patent before the court. He might otherwise be prejudiced in a variety of ways,—as, by being precluded from giving evidence that the patent is void in part, or from setting up a release by an assignee of part, or by reason of the provision in the 5 & 6 W. 4, c. 83, s. 3, as to treble costs, inasmuch as he might be subjected to a multiplicity of actions.

into shares, so as to entitle part owners to hold in severalty, or sue for a supposed infringement of a part only of the patent right.

"That, if the validity of the patent be put in issue, the validity or invalidity must be decided not only with reference to the part or parts of the invention to the sole use of which the plaintiffs make claim, but also with reference to the part or parts of the invention the use of which Thomas Ball and William Ball are entitled unto."

Hayes, Serjt., in reply.—No doubt joint tenants of personalty must always join: per Littledale, J., in Doe *v.* Errington, 1 Ad. & E. 755 (E. C. L. R. vol. 28), 3 N. & M. 646 (E. C. L. R. vol. 28). But the question does not depend upon the thing being personalty: the question is, who has sustained the damage. Suppose one who is possessed of an interest in a moiety of a patent is about to assign, and a third person slanders his title by saying that his deed is invalid, and so he loses the sale; could it be contended that the owner of the other moiety of the patent, who has sustained no damage, must join in the action? The argument that a patent is one and indivisible is in opposition to reason and common sense. There may be many part owners of a patent, as there may be of a ship or a horse. And, if the patent embraces two distinct and separate inventions, there can be no reason why the two should not be held in severalty.

Manisty, Q. C., in support of the demurrer in *Dunnicliff v. Birkin.(a)—Thomas and William Ball, being parties interested in [*225 the patent, ought to have been before the court. If they *could* join they *must* join. It *may be, that, for the invasion of the patent right [*226 by the user of a part, substantial damages might be due to the owner of one part, and nominal damages only to the owner of the other part: but still all must join. If the two Balls had been made parties to this action, the defendants might have given in evidence admissions by them.

Hayes, Serjt., contrà.(b)—The plea in the second action contains an additional allegation "that, at the time of the supposed infringement

(a) The points marked for argument in Dunnicliff v. Birkin, were as follows:—

"That the plea is good, and the plaintiffs' replication is insufficient for the following, amongst other, reasons,—

"1. That the declaration and plea together show that Thomas Ball and William Ball were entitled unto some parts, shares, or interests in the declaration mentioned; and neither the declaration nor the replication shows that those parts, shares or interests were before the accruing of the causes of action assigned to or vested in the plaintiffs:

"2. That the declaration is bad, because it does not show that the plaintiffs were entitled to the whole patent right at the time when the supposed causes of action accrued:

"3. That the plaintiffs, not being entitled, or exclusively entitled, to the whole of the patent right, cannot sue alone for any infringement of the patent; and that Thomas Ball and William Ball, or other the person or persons entitled to the residue of the patent right, ought to have joined in bringing the action:

"4. That, if the supposed infringement mentioned in the declaration has been committed, it was a violation of a privilege entire in its nature, for which all the persons entitled unto the privilege must sue:

"5. That such a privilege could not be partitioned or divided into shares, so as to entitle part owners to hold in severalty, or sue for an infringement of a part only of the patent right:

"6. That, if the validity of the patent be put in issue, the validity or invalidity must be decided not only with reference to the part or parts of the invention to the sole use of which the plaintiffs make claim, but also with reference to the part or parts of the invention the use of which Thomas Ball and William Ball, or some other person or persons, was or were entitled unto, and ought to have been made plaintiff or plaintiffs:

"7. That the replication takes issue upon an immaterial allegation in the plea; and the replication is bad because it does not show that the parts, shares, rights, and interests which had been vested in Thomas Ball and William Ball had before the accruing of the causes of action been assigned to or otherwise vested in the plaintiffs."

(b) The points marked for argument on the part of the plaintiffs in Dunnicliff v. Birkin, were as follows:—"The traverse is good. Without the matter traversed, the plea would be bad. Even if the plea without that matter would be good, yet the matter in itself is pertinent and destructive to the plaintiffs' action, and therefore it cannot be rejected."

by the defendants of the said supposed patent right of the plaintiffs in the declaration mentioned, they the said Thomas Ball and William Ball were and continued to be entitled unto the said parts, shares, rights, and interests of and in the said letters patent and patent right to them assigned, as in the declaration mentioned." The plaintiffs take issue upon that allegation: and the defendants demur on the ground that that allegation is immaterial. It is not competent, however, to the defendants to reject that allegation: for, without it the plea would be a plea in bar, and not a plea in abatement, whereas the non-joinder of parties can only be taken advantage of by plea in abatement: Addison *v.* Overend, 6 T. R. 766.

*227] *Manisty*, in reply.—Assuming the replication to be *good, the question still remains on the declaration and the plea. Rejecting the allegation upon which the replication takes issue, the plea remains a perfectly good plea in abatement. There would still be a non-joinder.

ERLE, C. J.—I am of opinion that the plaintiffs are entitled to judgment on these demurrers. The main question which has been argued before us arises apparently for the first time; therefore we must decide it according to general principles of law, no authority having been cited which bears any very close analogy. That question is, whether an assignment of part of a patent is valid. I incline to think that it is. It is every day's practice, for the sake of economy, to include in one patent several things which are in their nature perfectly distinct and severable. It is also every day's practice by disclaimer to get rid of part of a patent which turns out to be old. Being, therefore, inclined to think that a patent severable in its nature may be severed by the assignment of a part, I see no reason for holding that the assignee of a separate part which is the subject of infringement may not maintain an action. Then, are the assignees bringing an action for an injury done solely to them by an infringement of that part of the patent which is thus vested in them alone, liable to be defeated because they have not joined the assignees of other parts of the patent, who have no manner of interest in the damages sought to be recovered in such action? I see no reason why the action should be defeated on any such ground. I see no reason why the plaintiffs should be put to the trouble and expense of applying for leave to use the names of the other parties, or of compelling them by means of a judge's order to permit their names

*228] to be used upon an indemnity, where no practical advantage *whatever is to be gained by it,—the injury being to the assignees of part only, and the damages to be recovered being theirs only. It is said that the defendants may possibly be prejudiced by the non-joinder of the other parties, inasmuch as they might thereby be deprived of the advantage of any admissions which might have been made by them. I cannot think that is a tenable ground of objection, because, if those parties were joined, any admissions by them would not be binding on the now plaintiffs, unless made in and for the purpose of the suit. Then, as to the alleged inconvenience of the matter being brought in question several times,—I must confess I do not feel the force of the argument. In the ordinary case of a patentee trying the validity of the patent against several infringers, the power given to the judge to certify under the 5 & 6 W. 4, c. 83, s. 3, is only a provision in favour

of the patentee, to entitle him to treble costs where the validity of the patent has already been established. I am not aware of any authority or of any principle which precludes the assignee of part of a patent from suing for an infringement of that part; nor do I think it would lead to any multiplying of actions to permit it. I am therefore of opinion that our judgment should be for the plaintiffs upon both these demurrers.

CROWDER, J. (*a*)—I am of the same opinion. I see no reason to doubt that an assignment of a separate and distinct part of a patent is valid. No authority has been cited to the contrary: and in practice these assignments are common. Assuming, then, that the plaintiffs are legally assignees of a part of this patent, the question is whether it is competent to them to sue alone in respect of an infringement of that part. I am *of opinion that it is, and that it was not necessary that the assignees of other distinct parts of the patent, who [*229 have no community of interest in the subject-matter with them, should join in the action. No authority for this has been brought before us. But, looking at it upon general principles and by analogy to other cases, I can only see two possible grounds of objection to the maintenance of the action by the plaintiffs alone, viz., that the non-joinder of the other parties is the result of fraud, or may occasion some damage either to the defendant or the Balls. Fraud is not suggested: and I cannot discover any damage that could possibly accrue to the defendants from the non-joinder of the Balls. The action is brought in respect of the infringement of one particular part of the patent, which is vested solely and exclusively in the plaintiffs. No doubt another action might be brought against the defendants for an infringement of that part of the patent which remains in the Balls. But I do not see that the defendants can be in the slightest degree prejudiced by that; for, they might equally have been liable to another action, if the whole of the patent right had been vested in the plaintiffs. Then it is said that the Balls are prejudiced by not being made parties to the action. But it does not appear to me that there is any foundation for that. The only suggestion which has any air of plausibility is that as to the certificate for treble costs under the 5 & 6 W. 4, c. 83, s. 3: but, upon consideration, I think that fails; for, the certificate under that statute would be in favour of the Balls, and not to their prejudice. As the damages are several, and sustained solely by the plaintiffs by reason of the infringement of the part of the patent vested in them, I see no reason why the action should not be brought by them alone.

BYLES, J.—I am of the same opinion. Having no *precedent [*230 to guide us in this case, we are compelled to have recourse to the general rules of law. There can be no doubt that an assignment of a patent to several persons in undivided shares is good. My Brother *Hayes* says the assignees would in that case take as tenants in common. If so, there can be no reason why they should not take different portions,—one, one tenth; another, nine tenths. Then, supposing the patent to be granted for two inventions which are separate and distinct in their nature, why should not one be assigned to one person and the other to another? I do not see why upon principle it should not be so. If that be so, the assignee of part of a patent would be more like a

(*a*) Williams, J., was engaged in the Divorce Court.

person to whom lands have been assigned in severalty than in common, and so would be severally entitled to damages for an invasion of his right. Mr. Serjt. Williams, in his notes to the case of Coryton v. Lithebye, 2 Wms. Saund. 117, says, "It has been laid down as a general rule that parties cannot join in an action for damages, unless the damages when recovered would accrue to them jointly." Now, here the damages which accrued in respect of the infringement of the portion of the patent which is complained of in this action, would belong exclusively to the owners of that part, and they alone could sue in respect of it. Whether a patent can be divided in this way or not, is an immaterial question: if it may be, the plaintiffs clearly may sue alone for the infringement of that part of the patent which is vested in them: if it may not, then all that can be said, is, that the distribution of the patent in the way disclosed by the declaration has been erroneously done, and the plaintiffs are entitled to maintain this action in respect of the right vested in them by the original grant. It is not enough for Mr. *Hindmarch* to make out that the breach assigned in the *231] declaration is for an infringement of that part of the *patent which is vested in the Balls, if it appears that there has also been an infringement of that part which is vested in the plaintiffs alone, for that infringement would give them a cause of action. The breach assigned is for an infringement of the patent "so far as the same relates to or concerns the making, using, exercising, and vending of the said invention of improvements in the manufacture of close weavings in twist lace machines, as described in the sixth part of the said specification." The infringement of that part of the patent which is vested exclusively in the plaintiffs at all events is comprehended in the breach. The damage for this accrues to them alone. Upon these grounds, it seems to me that the plaintiffs and they alone are entitled to maintain this action.

Judgment for the plaintiffs.

Under the first patent law of the United States, it was held, that an assignee of all the right, title, and privilege of his assignor in a patent, except in certain specified parts of the United States, could not maintain an action for an infringement in his own name: Tyler v. Tack, 6 Cranch 324. But in Whittemore v. Cutter, 1 Gallison 429, it was held that an action would lie in the names of the patentee and an assignee of a moiety; and Tyler v. Tack was distinguished on the ground that no assignment of a patent for a local subdivision was possible. And in Ogle v. Ege, 4 Wash. C. C. 584, it was held held, that whatever might be the rule at law, an assignee might be joined with his assignor in a suit in Equity.

The technical difficulties of this subject were to a great degree removed by the Act of 1836. The 11th section of that act provided, that "Every patent shall be assignable at law either as to the *whole interest* or any *undivided part thereof*, by any instrument in writing: which *assignment*, and ALSO any *grant* or *conveyance* of the *exclusive right* under any patent to make and use, and to grant to others the right to make and use the thing patented, within and throughout any specified part of the United States, shall be recorded" as therein set forth. The 14th section, then, after providing for the damages in case of an infringement, proceeds: "And such damages may be recovered by action on the case, in any court of competent jurisdiction, to be brought

in the name or names of the person or persons interested, whether as *patentees*, *assignees*, or as *grantees* of the exclusive right within and throughout a specified part of the United States."

Under these sections several decisions have been made.

Thus it has been held, that the assignee of an exclusive right, to construct, use, and vend to others to be used, two patented machines, within a certain town, could maintain an action in his own name for an infringement within these limits, even against the patentee himself: Wilson *v.* Rousseau, 4 How. U. S. 686. But in Gaylor *v.* Walder, 10 How. 477, it was held, that the grant of a territorial right must be absolute and exclusive; and, therefore, that an agreement that the assignee might make and vend the patented article within certain specified limits, upon paying the assignor a certain sum per pound, reserving however to the assignor the right to establish a manufactory of the article within the same limits, on payment of the same sum per pound to the assignee, amounted only to a license, and did not enable the assignee to sue in his own name. So in Suydam *v.* Day, 2 Blatch. 21, it was held that under the statute, an exclusive right of action exists in favour of a sole assignee only in two cases, viz.: where he acquires by assignment the whole interest in the patent, or by grant or conveyance the whole interest within some particular district or territory, and that the subject-matter of a patent is not partible except as to territorial assignments. Therefore, where an assignment is made of part of a patent, as to use the improvement in the manufacture only of a particular kind of goods, this is only a license, and suit for an infringement must be brought in the name of the patentee only. So where there was a patent for turning irregular forms *generally*, and the patentee granted to another the *full and exclusive* license, right and permission to use it for turning *shoe lasts*, a third person having infringed the patent in turning *shoe lasts*, it was held that the action was properly brought in the name of the patentee: Blanchard *v.* Eldridge, 1 Wall. Jr. 337. So again, where a patentee of friction matches, by deed purported to convey and assign to B., his executors, administrators, and assigns, the right and privilege of manufacturing the said matches, and to employ in and about the same, six persons and no more, and to vend the matches in any part of the United States, it was held only to be a license: Brooks *v.* Byam, 2 Story 525.

But the assignees of an undivided interest may join with the holder of the title, in suing for an action for an infringement: Stein *v.* Goddard, 1 McAllister, C. C. 82; and on the other hand it was said in Bicknell *v.* Todd, 5 McLean 240, that "It is not to be doubted, that a patentee or his assignees on transferring a part of a patent, may reserve the right to prosecute for piracies. He is interested in the entire patent, and any suit for a violation of it, may involve the validity of the right claimed."

RALPH ROBINSON and JOHN ROBINSON, Executors of LYDIA ROBINSON, deceased, *v.* LORD VERNON. *Nov.* 18.

An action was brought in a county court in the names of A. and B., as executors of C., in respect of a claim accruing to the testatrix. B. executed a release the day before the trial. The counsel for the plaintiffs (upon whom the release came by surprise) proposed to call B. and to examine him as to the circumstances under which he had executed the release, for the purpose, as he said, of eliciting from him whether or not it had been fraudulently obtained, but without alleging the existence of fraud in fact. The judge refused to permit B. to be examined for that purpose, and the plaintiffs were nonsuited. This court, on appeal, set aside the nonsuit, with costs.

An objection to the admissibility of a document for the want or insufficiency of the stamp, must be taken at the time it is tendered in evidence.

THIS was an appeal from a decision of the county court of Macclesfield.

The plaintiffs were the sons and executors of Lydia Robinson, deceased, under whose will they were also beneficially entitled to two-
*232] thirds of any sum which *might be recovered in this action; and they sought to recover a sum of 50*l.* from the defendant for compensation for alleged permanent improvements made by the testatrix upon a farm at Poynton belonging to the defendant, whilst she was tenant of the same.

The plaintiffs' case was, that there was a certain custom of the country prevailing in the district within which the farm was situate, for outgoing tenants to receive from the landlord the value of permanent improvements made by tenants on their farms. The testatrix had resided for a very long period on the farm in question, and continued to do so at the time of her decease. Shortly after this occurred, viz. in the autumn of 1856, the defendant's agent gave notice to the plaintiffs to quit the premises in the following spring. The plaintiffs thereupon caused a valuation to be made of the improvements in respect of which they claimed compensation under the alleged custom, and called upon the defendant to pay them the amount. The defendant rejected the claim altogether; and, as the plaintiffs refused to give up possession at the expiration of the notice, they were ultimately removed by ejectment.

At the time of the commencement of this action, and of the trial, the plaintiff John was and had been for some time a tenant of the defendant; and it was in evidence that these proceedings had been instituted and were maintained in the names of both plaintiffs by Ralph alone, without the consent of or any communication with his co-plaintiff, John.

John, who had in his possession the probate of the testatrix's will, was subpœnaed by his co-plaintiff Ralph, and appeared accordingly; but, having before the trial handed that document to the defendant's attorney, who produced it when called for by the plaintiffs' counsel, he was not sworn or examined.

*233] *The plaintiffs' case was closed without any question having been put on cross-examination as to any release by the plaintiffs of this claim; but the holding over, the ejectment, and the fact of the action having been brought without John's concurrence, were so elicited.

The defendant rested his case upon the following release, executed in the course of the day before the trial:—

"To all to whom these presents shall come, I, John Robinson, of Poynton, in the county of Chester, farmer, for divers good causes and considerations me hereunto moving, do hereby, for myself, my heirs, executors, and administrators, remise, release, acquit, and discharge the Right Honourable George John Warren, Baron Vernon, his heirs, executors, and administrators, and all his and their estates and effects whatsoever and wheresoever, of and from all sums of money, accounts, reckonings, actions, suits, claims, and demands whatsoever which I and Ralph Robinson, either as executors named and appointed in and by the last will and testament of Lydia Robinson, late of Poynton aforesaid, widow, deceased, dated on or about the 16th day of July, 1852, and proved in the Consistory Court of the diocese of Chester on or about the 2d of July, 1856, or otherwise howsoever, now have or claim, or can, shall, or may have or claim of, from, or against the said George John Warren, Baron Vernon, his heirs, executors, or administrators, up to and inclusive of the day of the date of these presents. In witness, &c."

It did not appear that the agent of the plaintiff Ralph had been asked, or that he had been consulted with reference to this document.

The plaintiffs' counsel then contended that the release being of the whole cause of action by one only of two joint plaintiffs, it was no defence. The *judge, however, ruled otherwise, and intimated, [*234 that, as the case then stood, he should direct the jury to find for the defendant.

Upon this, the plaintiffs' counsel, admitting that the defence had taken him by surprise, proposed to call the plaintiff John and examine him as to the circumstances under which he had executed the document in question,—for the purpose, as he said, of eliciting from him whether it had been fraudulently obtained, but without alleging the existence of fraud in fact.

The judge refused under the circumstances and for that purpose to permit the plaintiff John to be then examined; and therefore the plaintiffs' counsel elected to be nonsuited.

The question for the opinion of this court is, whether the judge was right in so refusing to allow the plaintiff John Robinson to be called and examined on behalf of the plaintiffs, for the purpose stated by their counsel.

Wheeler, for the appellant.—It clearly was competent to the plaintiffs' counsel to call John Robinson for the purpose suggested. If this had occurred in a superior court, the release would have been pleaded puis darrein continuance, to which the plaintiffs might have replied by denying the release or alleging that its execution was obtained by means of fraud and misrepresentation. The absence of pleadings in the county court does not alter the rights of the parties in this respect.

Powell, for the respondent.—The plaintiffs are co-executors. The action is brought with reference to the administration of the estate of their testratrix. The defendant puts in a release executed by one of the plaintiffs; and the question is whether he can be permitted to get into the witness-box and deny his deed, or allege that he was induced by fraud to execute it. *[CROWDER, J.—It may be that the [*235 execution of the release by John Robinson was induced by some imposition practised upon him. ERLE, C. J.—He may have been

purposely made intoxicated, and may have signed the deed without knowing what he did.] There is no plea or suggestion of fraud on the part of the defendant. [BYLES, J.—I do not see why the defendant should be in a better situation than he would have been in if there had been a plea puis darrein continuance.] The question is whether the plaintiffs' counsel ought to have been permitted to call one of the plaintiffs, and to enter into a fishing inquiry as to the circumstances under which he executed the release and the motives which induced him to execute it.

PER CURIAM.—We think there has been a miscarriage on the part of the judge. There must therefore be a new trial, the respondent paying the costs of the appeal. Judgment accordingly.

The case again came on for trial before the same learned judge on the 5th of January, 1860, and the following case was stated by way of appeal against his ruling:—

The plaintiffs, as the executors of Lydia Robinson, deceased, sought to recover 50*l.* (part of a sum of 60*l.* 16*s.* 2*d.*) as the value of certain alleged permanent improvements made by her in her lifetime on a farm at Poynton, of which the defendant was owner, and of which the testatrix had for many years before her death been tenant. The claim was made on an alleged custom, the existence of which the defendant denied.

*236] The first witness called was the plaintiff Ralph *Robinson; and, on his being sworn, the probate of the will (which was in the possession of and was produced by the defendant's attorney) was called for by the plaintiffs' counsel, and he handed it to Ralph, who identified it, and proved that he and the co-plaintiff were the executors therein named. *It was then put in and read, without any objection being taken or question raised as to its admissibility.* It bore a 5*l.* stamp, being the proper stamp for a value not exceeding 300*l.* The plaintiffs' counsel then examined Ralph in support of the plaintiffs' claim.

The defendant's attorney commenced his cross-examination by producing and putting into Ralph's hands the residuary account of Ralph and the other plaintiff made to the stamp-office for payment of duty; and Ralph identified it, and proved his signature thereto. It showed the amount of 281*l.* 17*s.* 4*d.*, exclusive of the 50*l.* sought to be recovered; whereupon the defendant's attorney applied for a nonsuit, on the ground that, as the 50*l.* and the 281*l.* 17*s.* 4*d.* together amounted to a greater sum than was covered by the stamp, the probate was inadmissible in evidence, and consequently there was no proof of the plaintiffs' title as executors.

The judge directed the trial to proceed.

At the close of the plaintiffs' case, the defendant's attorney again applied for a nonsuit, on the same ground. The judge thereupon held in favour of the objection, and directed a nonsuit.

The question for the opinion of this court is, whether the judge acted properly in nonsuiting the plaintiff.

Wheeler, for the appellant.—All that was denied on the part of the

defendant was the existence of the custom: the representative character of the plaintiffs was admitted. The probate, too, was admitted *without objection. [WILLIAMS, J.—The only question is, whether the objection to the sufficiency of the stamp was taken in time.] An objection of this sort must be taken at once when the document is offered in evidence, if available at all. In Whyte *v.* Rose, 3 Q. B. 493, 499 (E. C. L. R. vol. 3), Lord Abinger, C. B., in the course of the argument, says: "I recollect once objecting to a probate on the ground that the stamp was not sufficient for the amount of the property; but Lord Kenyon would not listen to the objection." In Carr *v.* Roberts, 2 B. & Ad. 905 (E. C. L. R. vol. 22), there was no stamp at all: and there was, amongst others, a plea that the plaintiff was not administratrix. On proving a will, the executor need not, in the amount for which probate duty is paid, include debts due to the testator which are either desperate or doubtful; and he has a right to exercise his judgment fairly and bonâ fide whether a debt is doubtful or bad: Moses *v.* Crafter, 4 C. & P. 524 (E. C. L. R. vol. 19). There is no case where this collateral issue has been allowed to be raised for the purpose of proving, that, by something which has been or may be received, the probate stamp is or may be insufficient. [*237

Welsby, for the respondent.—The objection to the stamp was duly taken. The probate was an essential part of the plaintiffs' case. In Hunt *v.* Stevens, 3 Taunt. 113, it was held, that, if an administrator shows that he sues for a greater value than is covered by the ad valorem stamp of his letters of administration, he shows his administration to be void, and cannot recover: and that is confirmed by Carr *v.* Roberts. That case is cited in 1 Williams on Executors, 5th edit. 542, where it is said: "A very important regulation, as to the consequences of not obtaining the requisite stamp, which was contained in the former stamp acts, and re-enacted by s. 8 of the *55 G. 3, c. 184, is, that no instrument not properly stamped shall be given in evidence. Hence, where an executor or administrator brings an action in which it is necessary for him at the trial to prove his representative character, if his case shows that he sues for a greater value than is covered by the stamp of his probate or letters of administration, he cannot recover; for, the instrument, not being properly stamped, cannot be given in evidence; and he is therefore excluded from the only means of showing the fact of his being executor or administrator. Nor will it make any difference that he is suing for a doubtful claim." That the objection is a valid one is therefore clear. The only question is whether it was taken in time. Now, at the time it was put in, there was nothing upon which to found the objection: that arose only when the residuary account was produced. In Field *v.* Wood, 7 Ad. & E. 114 (E. C. L. R. vol. 34), 2 N. & P. 117, 6 Dowl. P. C. 23, 8 Car. & P. 52 (E. C. L. R. vol. 34), it is laid down, that, where a document produced on a trial would, from some defect, be inadmissible, if objected to, the practice in general is, that, if such document has been put in and read, the objection cannot afterwards be taken: but, where the defect requires extrinsic evidence to show it, as when a check has been post-dated, the instrument is to be read, and the ground of objection afterwards proved as part of the defendant's case. [WILLES, J.—Was not that case somewhat shaken by the second case of Boyle *v.* Wiseman?] It is conceived not. [*238

Wheeler, in reply.—The objection to the admissibility of an instrument for the want or insufficiency of the stamp, must be taken at the time it is tendered in evidence: Doe d. Phillip *v.* Benjamin, 9 Ad. & E. 644 (E. C. L. R. vol. 36). There, a paper had only an agreement stamp. On the trial of an ejectment, it was given in evidence as an *agreement. The counsel producing it were afterwards obliged, during the trial, to rely upon it as a lease. No objection was then or previously taken to the stamp. On argument in banc as to the operation of the document, the want of a proper stamp was urged. It was held that the objection came too late, and should have been taken at that period of the trial when counsel first stated that they should rely upon the instrument as a lease. [WILLIAMS, J.—That is so where the stamp depends on that which appears upon the face of the document: but the rule may be different where its sufficiency depends upon a fact dehors the document. The point is of general importance, and therefore we will take time to look into the cases.] *Cur. adv. vult.*

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BYLES, J., now delivered the judgment of the court:—

It appears to us that this case is not concluded by the decision of the Court of Queen's Bench in Field *v.* Wood, 7 Ad. & E. 114.

There, the objection was stated at the time when the document was tendered in evidence, and the proof of those facts which rendered the stamp necessary was reserved without objection until the defendant's case. The judgment of Littledale, J., explains that to have been the state of facts upon which the judgment proceeded.

The principle to be collected from all the cases appears to be, that the objection for want of a stamp ought to be taken at the earliest possible moment, so that the time of the court shall not be wasted by protracting an inquiry which may at any time be rendered futile by such objection.

Applying that principle to the present case, it appears to us that the objection came too late, and *that the nonsuit ought to be set aside, and a new trial had.

*240]

And we must order the defendant to pay the costs of the appeal; otherwise the redress thereby given would be fruitless.

Judgment for the appellant, with costs.

ROOK, Appellant; THE MAYOR, ALDERMEN, AND BURGESSES OF LIVERPOOL, Respondents. *Nov.* 20.

By the Liverpool Corporation Water Works Act, 1847, 10 & 11 Vict. c. cclxi., the rates at which water is to be supplied for domestic purposes, are to be assessed upon the "annual value" of the premises: and by the 18th section of the Liverpool Corporation Water Works (Amendment) Act, 1850, 13 & 14 Vict. c. lxxx., it is enacted, that, if the owner of any dwelling-house the *yearly rent or value* whereof shall not amount to 13*l.*, or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the council may compound with such owner for the payment of the water-rents payable by virtue of the acts in respect of such dwelling-house at any sum not less than three fourths of the annual water-rent for the same; and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the act are by law recoverable.

By a composition paper, the appellant, as the owner of certain dwelling-houses let to weekly tenants, agreed with the corporation to compound for the water-rates, and in a schedule thereto stated the "rental to be 4*s.* 6*d.* per week and 3*s.* 6*d.* per week respectively." The composition paper contained a stipulation, that, "if at any time it should be ascertained that the *rental* of such houses was not truly and correctly set forth in the schedule, the corporation might be at liberty to amend the same by inserting therein the true and correct amounts of such *rental*," and might recover against the appellant the additional water-rents due in respect thereof.

The rents of the houses were in point of fact 6*d.* per week respectively more than the sums stated in the schedule,—the appellant claiming to deduct that sum in respect of poor and other rates which by agreement with the tenants were paid by him:—

Held, that the appellant was not entitled to make such deduction, but that the corporation were entitled under the agreement to receive the composition upon the amount of *rent* paid by the tenants.

Held also, that the production of the composition paper, and proof that no demand of water-rates had been made upon the tenants, was sufficient evidence that the composition had been made, without showing that any entry thereof had been made in the books of the council.

THIS case was stated for the opinion of the Court of Common Pleas under the 20 & 21 Vict. c. 43, by John Smith Mansfield, one of Her Majesty's justices of the peace in and for the borough of Liverpool.

*The appellant Henry Rook was summoned before me upon [*241 information and complaint laid by John Allison, a collector of water-rates for and on behalf of and duly authorized by the said mayor, aldermen, and burgesses of the borough of Liverpool, the repondents, to recover certain sums of money alleged to be due from him to them in respect of water supplied by them to premises belonging to him, under the following circumstances:—

By an act passed in the 10th & 11th years of the reign of Her present Majesty, "The Liverpool Corporation Water Works Act, 1847," the said mayor, aldermen, and burgesses are authorized and empowered to supply the inhabitants of the said borough with water, and to make certain charges in respect thereof.

The corporation do not derive any profit from such charges, and any surplus arising is directed to be applied in the reduction of rates.

"The Water Works Clauses Act, 1847," is incorporated with and directed to be taken as part of such last-mentioned act; and in and by such Water Works Clauses Act it is directed that the owners of all tenements the annual value of which shall not exceed 10*l.*, shall be liable to the payment of the water-rate payable in respect of such tenements, instead of the occupier thereof.

By the "Liverpool Corporation Water Works Amendment Act, 1850" (13 & 14 Vict. c. lxxx.), s. 18, it is enacted, that, if the owner of any dwelling-house within the limits of said Liverpool Corporation Water Works Act, 1847 (10 & 11 Vict. c. cclxi.), the *yearly rent* or *value* whereof shall not amount to 13*l.*, or which, whatever may be the *annual value* thereof, shall be let to weekly or monthly tenants or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the said *council may compound with such owner for the payment of the water-rent and [*242 charges payable by virtue of the said act and this act in respect of such dwelling-house, at any sum not less than three-fourths of the annual water-rent or charge for the same: and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the said act are by law recoverable.

And by the last-mentioned act it is also enacted, that, if any person who shall be liable to payment in respect of a supply of water under the act first above named, or the last-named act, shall neglect or refuse to pay the amount due in respect of such supply for fourteen days after demand, any justice having jurisdiction where such person shall then reside, or where the water shall have been supplied, may issue his summons against such person, and payment may be enforced by warrant of distress.

On the 26th of December, 1856, the said Henry Rook, being the owner of several small tenements within the said borough, delivered to the respondents, and they then received from him, a composition paper in the words and figures following, that is to say:—

"No. 2464.

"I, Henry Rook, being the owner of the houses mentioned in the schedule hereunto annexed, being respectively dwelling-houses let to weekly or monthly tenants or in separate apartments, or at a *yearly rental* under 13*l.*, as respectively described in such schedule, do hereby, in accordance with the provisions of the Liverpool Corporation Water Works (Amendment) Act, 1850, and subject thereto, compound with the mayor, aldermen, and burgesses of the borough of Liverpool for the water-rents and charges payable in respect of such houses respectively; *243] and, in consideration of *receiving a discount of 25 per cent. upon the water-rents and charges payable in respect of such dwelling-houses respectively, and of the said mayor, aldermen, and burgesses not requiring payment of such water-rents and charges from the tenants of such houses respectively (as are above the annual value of 10*l.*), do hereby agree with the said mayor, aldermen, and burgesses, to pay to them, on or before the 24th day of March next ensuing, the water-rents and charges in respect of such houses respectively, whether occupied or not, for the whole of the year 1857; and I consent, in case default shall be made by me in payment of such composition at the time before mentioned, that the full amount of such water-rents respectively from the 25th day of December, 1856, to the 24th day of December, 1857, and without any discount thereon, shall be a debt due from me to the said mayor, aldermen, and burgesses, and may be recovered as water-rents are by the Liverpool Corporation Water Works Act, 1847, and the Liverpool Corporation Water Works (Amendment) Act, 1850, authorized to be recovered, or by action at law in any court of competent jurisdiction: and I also consent, if at any time it shall be ascertained that the *rental* of such houses respectively is not truly and correctly set forth in the said schedule, then the said mayor, aldermen, and burgesses may be at liberty to amend the same by inserting therein the true and correct amounts of such *rental*, and may in the manner before mentioned recover against me the additional water-rents and charges due in respect thereof: And I also consent, that, in case of the non-payment of all or any part of the before-mentioned water-rents and charges at the time hereinbefore provided for payment thereof, the said mayor, aldermen, and burgesses may stop the water from flowing into all or any of the said houses, by cutting off the pipe to such houses, or *244] by *such means as they shall think fit, and the expenses of cutting off the water may be recovered against me in the same

manner as the said water-rents and charges are made recoverable by the said acts or by this composition. Dated this 26th day of December, 1856. HENRY ROOK."

The schedule above referred to.

Name of Tenant.	No. of Houses.	Street or Situation.	Rentals of Property let at				
			Per Week.	Per Month.	Per year, under 13*l.*		
					£	*s.*	*d.*
	6 } 8 }	Smithdown Lane			19	0	0
	10 } 12 }	Ditto			15	0	0
5	„	Date Street, at	4*s.*				
1	60	Myrtle Street			25	0	0
1	62	Ditto(*a*)			30	0	0
5		Berwick Place 3	4*s.* 6*d.*				
		Brownlow Street 2	3*s.* 6*d.*				
	9	Chesnut Street			20	0	0
	11	Ditto			12	0	0

"N. B. Parties intending to compound for payment of the water-rents for the year 1857, must leave the schedules of agreement either with the collector of the district in which the property is situate, or at the public offices (treasurer's department), No. 2, Cornwallis Street, on or before Saturday, the 27th day of December, 1856, and not later than six o'clock in the evening of that day; as none can be admitted after that time, by the express directions of the water committee."

The respondents did not make any alteration in the said composition paper or in the schedule thereof; and, *on the 24th of January, 1857, the respondents rendered the appellant a bill charging [*245 him upon the rent actually paid by the tenants to him, and being the amounts presently mentioned.

The appellant objected to pay, and did not pay, the amount demanded in the bill so rendered to him by the respondents; but he tendered the amount he admitted to be due by the schedule to the composition paper rendered by him, but the respondents claimed the larger amount as stated in the bill rendered to the appellant, and refused his tender, and treated the non-payment of the sum claimed as a default; and thereupon the following information was laid against the appellant in respect thereof:—

"O. S.: Composition.

"Borough of Liverpool, to wit.

"Be it remembered, that, on the 8th day of October, 1857, at the borough of Liverpool aforesaid, John Allison, of Liverpool aforesaid, cometh before me, John Crosthwaite, Esq., one of Her Majesty's justices of the peace in and for the said borough, and, for and on behalf of, and being duly authorized in that behalf by, the council of the borough of Liverpool aforesaid, informeth me the said justice, and complaineth, that, on the several days and times mentioned and set forth in the fifth column of the schedule hereafter written and referred to, and

(*a*) The premises respecting which the dispute arises are the five houses in Date Street and the five houses in Berwick Place and Brownlow Street: no question arises in this case as to the other premises in the schedule.

therein set opposite to the names of the several persons mentioned and contained in the said schedule, the said several persons whose names are contained and mentioned in the second column of the said schedule were severally and respectively the owners of certain dwelling-houses situate in the respective streets and places within the said borough, and within the limits of the Liverpool Corporation Water Works Act, 1847, which are also named in and placed opposite to their several and respec-
*246] tive names in the third *column of the said schedule, and which said dwelling-houses were then and there respectively supplied with water by the said mayor, aldermen, and burgesses for the domestic uses and purposes of the respective occupiers thereof, the yearly rent or value of which said dwelling-houses did not then respectively amount to 13*l.*, parts of which said dwelling-houses were then respectively occupied as separate tenements, which said dwelling-houses were then respectively let to weekly or monthly tenants; and that the said several persons whose names are contained in the said second column of the said schedule, being desirous of paying a reduced water-rent by the year for the same houses, whether they should be occupied or not, the said mayor, aldermen, and burgesses did, on the said several days and times mentioned and set forth in the said fifth column of the said schedule, at and within the borough aforesaid, under and by virtue of the provisions of the Liverpool Corporation Water Works (Amendment) Act, 1850, enter into contracts, partly printed and partly written, with the said several persons whose names are contained and mentioned in the said second column of the said schedule, in and by which they did then and there compound with the said several persons for the payment of the water-rents and charges payable under and by virtue of the provisions of the said Liverpool Corporation Water Works Act, 1847, and the said Liverpool Corporation Water Works (Amendment) Act, 1850, in respect of the said dwelling-houses, at and for the several sums of money specified and set forth in and by the said several contracts, such said sums not being less than three-fourths of the annual water-rent and charges for the same: And the said mayor, aldermen, and burgesses, in pursuance of the said several contracts, to wit, on the said several days and times mentioned and set forth in the said fifth column
*247] of the *said schedule, and on divers other days and times between those days and times and the making of this complaint, at and within the borough aforesaid, did supply the occupiers of the said houses for the time being with water for the uses and purposes aforesaid; and that, under the said several contracts, the several sums of money set opposite to their respective names in the seventh column of the said schedule became and are now due and owing from the said several persons whose names are contained and mentioned in the said second column of the said schedule to the said mayor, aldermen, and burgesses of the borough of Liverpool aforesaid in respect of such several compositions, which said several and respective compositions were and now are entered in the books of the council of the said borough of Liverpool; and that the said several persons, being such owners, and having compounded as aforesaid, have neglected and still do neglect to pay the said several sums of money so due and owing from them as aforesaid, although the same hath been duly demanded of them, and more than fourteen days have elapsed since the same hath been demanded of them respectively: Whereupon the said John Alli-

son, on such behalf as aforesaid, prayeth the advice of me the said justice in the premises, and that the said several persons may be forthwith summoned before one of Her Majesty's justices of the peace in and for the said borough, to answer the said premises, and to show cause why the said sums so demanded should not be paid.

"Exhibited to and taken and made before me the said justice, at Liverpool, in the borough of Liverpool, aforesaid, the day and year first above written.
JOHN CROSTHWAITE." } "JOHN ALLISON."

*" *The schedule before referred to.* [*248

First Column.	Second Column.	Third Column.	Fourth Column.	Fifth Column.	Sixth Column.		Seventh Column.				Costs.	Total.		
No.	Names.	Street or Place.	Premises.	Date of Contract.	Supplied to		Amount due.							
636, 7							(a)							
643, 5	Henry Rook	Brownlow Street	5 houses		June	Dec.	1	10	0½	2s	1	12	0½
857, 8	Ditto.	Chesnut Street	2 ditto		...	...	0	15	4	2s	0	17	4
1114,18	Ditto.	Date Street	5 ditto		...	...	1	9	2	2s	1	11	2
2512,13	Ditto.	Myrtle Street	2 ditto		...	...	1	4	9	2s	1	6	9

Whereupon the following summons was served upon the appellant:—

"O. S.: composition.

"Borough of Liverpool, to wit.

"To Mr. Henry Rook.

"Whereas complaint hath this day been made by John Allison, of the borough of Liverpool, in the county of Lancaster, for and on behalf of, and being duly authorized by, the council of the said borough of Liverpool, in the borough aforesaid, before me, the undersigned, one of Her Majesty's justices of the peace in and for the borough of Liverpool aforesaid, for that you the said Henry Rook, on the 26th day of December, 1856, were the owner of certain houses situate in Brownlow Street, Chesnut Street, Date Street, and Myrtle Street, in the borough aforesaid, and within the limits of the Liverpool Corporation Waterworks Act, 1847, and which houses were then and there supplied with water by the said mayor, aldermen, and burgesses for the domestic uses and purposes of the occupiers thereof, which said houses were then let to weekly or monthly tenants; *and that you then being desirous of paying a reduced water-rent by the year for the same [*249 houses, whether they should be occupied or not, the mayor, aldermen, and burgesses of the said borough did, on the day and year aforesaid, to wit, on the 26th day of December, 1856, at and within the borough aforesaid, under and by virtue of the provisions of the Liverpool Corporation Waterworks (Amendment) Act, 1850, enter into a contract, partly printed and partly written, with you, in and by which they did, then and there compound with you for the payment of the water-rents and charges payable under and by virtue of the provisions of the Liverpool Corporation Waterworks Act, 1847, and the said Liverpool Corporation Waterworks (Amendment) Act, 1850, in respect of the said

(a) These amounts are the full moiety of the water-rent *not* allowing the 25 per cent. The sums now in dispute are those in the first and third items relating to Brownlow Street and Date Street. The other sums are not in question.

dwelling-houses at and for the sums of money specified and set forth in and by the said contract, such said sums not being less than three-fourths of the annual water-rents and charges for the same; and that the said mayor, aldermen, and burgesses, in pursuance of the said contract, did afterwards, to wit, on the said 26th day of December, 1856, and on divers other days and times between that day and the making of this complaint, at and within the borough aforesaid, supply the occupiers of the said dwelling-houses for the time being with water for the uses and purposes aforesaid; and that under the said contract a certain sum of money, to wit, the sum of 4*l.* 19*s.* 3*d.*,(*a*) became and is now due and owing from you the said Henry Rook to the said mayor, aldermen, and burgesses of the borough of Liverpool aforesaid in respect of such com position, which said composition was and now is entered in the books of the council of the said borough of Liverpool, and that you do neglect
*250] to pay the said sum of *4*l.* 19*s.* 3*d.* so due and owing from you to the said mayor, aldermen, and burgesses as aforesaid, although the same hath been duly demanded of you more than fourteen days before the making of the said complaint: These are, therefore, to command you, in Her Majesty's name, to be and appear on the 15th day of October, at eleven o'clock in the forenoon, at the Sessions House, Chapel Street, Liverpool, within the said borough, before such one of Her Majesty's justices of the peace in and for the said borough as shall be then and there present, to show cause why you neglect to pay the said sum of 4*l.* 19*s.* 3*d.* so due and demanded as aforesaid, and to be further dealt with according to law.

"Given under my hand and seal, this 9th day of October, 1857, at Liverpool, in the borough of Liverpool aforesaid.

"JOHN CROSTHWAITE." L. S.

On the 16th of July last, such summons, after several adjournments, was heard before me; and, having fully considered the matter, I made an order against the appellant for the full sum claimed by the respondents, whereupon he demanded a case for the opinion of court; and this case is stated accordingly.

In addition to the above facts, which I state as part of the case, I find that the rent of the three houses in Berwick Place, Brownlow Street, stated in the said schedule to be 4*s.* 6*d.* per week each, was really 5*s.* per week each; the rent of the two houses in the same street stated in the schedule to be 3*s.* 6*d.* per week each, was really 4*s.* per week; and the rent of the five houses in Date Street, stated in the schedule to be 4*s.* per week each, was really 4*s.* 6*d.* per week each. The amount of composition which the appellant offered to pay in respect of such pre-
*251] mises was the amount due *for the year on the *annual value* as stated in the said schedule: the amount which the respondents demanded was the amount on the *rental* actually received from the tenant: and the summonses heard before me related to the larger sum.

The evidence given by the respondents of the composition consisted of the agreement hereinbefore set forth, the bill so rendered as aforesaid by the respondents to the appellant, and the facts that the respondents

(*a*) This sum includes the water-rent for the premises in question and other premises not in dispute in the present case.

did not deliver bills to the tenants of the premises or make any demands against them for water-rent, which they would have done but for such composition.

It was thereupon contended by the appellant that there was no sufficient evidence before me of any composition whatever having been made between the parties, and further that I had no jurisdiction given to me by virtue of the alleged agreement; whereupon I decided and determined that the said composition paper and bill and the other proceedings of the respondents as aforesaid did afford sufficient evidence of composition, and that I had jurisdiction.

It was further contended before me by the appellant, that the respondents could only recover on the rental stated in the schedule, and that I had no power to deal with any other rental; whereupon I decided and determined, that, if the amount of rent inserted in the said schedule by the appellant was not the true and correct rent received from the tenant, then that the respondents were under the terms of the composition entitled to charge the appellant on the full rent received by him, without any deductions. And I thereupon proceeded to inquire into the facts of that part of the case: and I find that the said appellant receives from the occupiers of the houses in question the several rents hereinbefore stated, and that he compounds *for the parish rate, the [*252
sanitary rate, and the water-rate for the said houses, and that part of the conditions of the letting, and part of the consideration for the payment by the said occupiers of the said rents, is, that the tenants are to be free from such taxes. And I find that the sum paid by the appellant in respect of such composition amounts in the whole to 6*d.* a week for each house.

The appellant contended, that, in compounding for the payment of water-rate, he had a right to consider the *annual value* of such house was to be calculated on a rental of 4*s.* 6*d.* and 3*s.* 6*d.* a week respectively, and not on 5*s.* and 4*s.* a week respectively, as aforesaid; and that therefore the rental or annual value was truly and correctly set forth in the said schedule so delivered by him. I was of opinion, however, that it was the meaning of the acts of parliament under which the said rates were levied, that the composition should be made on the *actual rent* of the premises received by the appellant, and that he was not entitled to deduct the said sums therefrom on account of the parish and other rates paid by him: and I therefore decided and determined that the rent of the said premises was not truly and correctly stated in the said schedule by the appellant, and that he was liable to pay the remaining moiety of the sum charged by the respondents, and I therefore made an order for payment of such last-mentioned sum.

The said Henry Rook being dissatisfied with my determination, and having applied to me in writing within three days after such determination to state and sign a case setting forth the facts and grounds of such determination, for the opinion thereon of the Court of Common Pleas, and having duly entered into the recognisance, and performed all the preliminaries *required by the statute 20 & 21 Vict. c. 43, I [*253
hereby state such case, in compliance with such application, and request the opinion of the court thereupon, and that the said court will make such order and take such steps thereon as to the said court may seem right.

The questions on which the appellant wishes to ask the opinion of the court are as follows,—1. Whether the evidence given was sufficient evidence of a composition having been entered into between the parties,—2. Whether, in stating in the schedule to the composition paper the annual value of the premises, for the purpose of the said composition, the appellant had a right to deduct from the amount received by him from the tenants the sum of 6*d.* per week in respect of the parish and other rates paid by him, amounting to such sum of 6*d.* a week.

Aspinall, for the appellant.(*a*)—The conviction is bad. There was no evidence of any composition having been entered into between the parties. The provision under which the composition was supposed to have been made, is contained in the 18th section of the Liverpool Corporation Waterworks (Amendment) Act, 1850, 13 & 14 Vict. c. lxxx., which enacts, "that, if the owner of any dwelling-house within the limits
*254] of *the said Liverpool Corporation Waterworks Act, 1847, the yearly rent or value whereof shall not amount to 13*l.*, or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the said council may compound with such owner for the payment of the water-rents and charges payable by virtue of the said act and this act in respect of such dwelling-house, at any sum not less than three-fourths of the annual water-rent or charge for the same; and all such compositions shall be entered in the books of the council, and shall be recoverable in like manner as the rents and charges authorized by the said act are by law recoverable." The case before the magistrate was rested upon the composition paper of the 26th of December, 1856, and the schedule thereto. There was no evidence of any composition but that upon the basis set forth in that schedule: and it did not appear that any composition whatever was entered in the books of the council, as required by that section.

The next question is, whether the composition paper has not stated everything that is necessary to be stated. The 111th section of the Liverpool Corporation Waterworks Act, 1847, 10 & 11 Vict. c. cclxi., which prescribes the rates at which water is to be supplied for domestic purposes, fixes the rate upon the *annual value* of the premises. The question is, whether the appellant had not a right to deduct from the rental the sums paid by him in respect of poor and other rates. The case of Moorhouse, app., Gilbertson, resp., 14 C. B. 70 (E. C. L. R. vol. 78), 2 Lutw. Reg. Cas. 260, has some bearing upon this question. It was there held, that one who has a freehold interest in property of the value of 40*s.*, but subject to an agreement to pay thereout a poor-
*255] rate charged upon *his tenant in respect of the premises, has not a freehold estate of the "clear yearly value of 40*s.*," so as to entitle him to a vote for the county. Jervis, C. J., there says: "The

(*a*) The points marked for argument on the part of the appellant were as follows:—"1. That it does not appear from the case as stated, that any composition was ever entered into between the parties. 2. That no composition was ever entered into, except upon the basis of the annual value of the premises stated in the schedule to the composition paper. 3. That the annual value of the premises was properly and duly stated in the said composition paper; and that the value so stated was the proper and legal basis of composition within the meaning of the acts of parliament mentioned in the case."

rent in this case is to be taken as the yearly value; and the yearly value to the voter is 40*s.* clear, if he is entitled to add the amount of the rate which he pays, but which is properly payable by the tenant. I am of opinion, however, that the rate is to be deducted, and therefore that the yearly value to the landlord is, as the revising barrister has found, 40*s.*, less the amount of the rate. The 6th section of the 18 G. 2, c. 18, means that the amount received by the landlord shall not be reduced by any rates or taxes chargeable upon him in respect of the premises. But here the landlord does not receive 40*s.* per annum. To entitle him to a vote, he must have 40*s.* before any question arises as to any deduction." And Maule, J., says: "It was not a question of deduction of charges, but whether the value of the premises amounted to 40*s.* I think it clearly does not, upon the statement submitted to us. The interest which the voter has in the premises, is, 40*s.* a year, subject to his agreement with the tenant to pay a charge which the tenant alone was liable to pay, viz. the poor-rate. With that stipulation, the interest of the voter is worth less than 40*s.* per annum. He does not get 40*s.* out of the land, but 40*s.* subject to the payment of a rate for which he has no equivalent." Upon that principle, the proper sums upon which the rate was to be assessed were 4*s.* 6*d.* and 3*s.* 6*d.* respectively, and not 5*s.* and 4*s.* [WILLES, J.—Is it a question of value or rental?] Of *value:* "Annual value" alone is mentioned in the rating clause of the 10 & 11 Vict. c. cclxi. [ERLE, C. J.—The 18th section of the act of 1850, speaks of the "yearly rent or value."] In Hamilton, app., Bass, resp., 12 C. B. 631 (E. C. L. R. vol. 74), 2 Lutw. Reg. Cas. 215, A. was registered as a *county voter in respect of an undivided thirtieth share of certain freehold property which was let at a [*256 gross yearly rent of 75*l.* 15*s.*, with an agreement that the landlords should pay all rates and taxes. These reduced the annual value to 63*l.* 3*s.* 7*d.*, and there was a further charge of 1*l.* 6*s.* for expenses of collection.(*a*) The average annual expenses of repairs, which were done by the landlords, and which the revising barrister found were necessary to enable them to obtain the net rent of 63*l.* 3*s.* 7*d.*, had for the preceding six years been 4*l.* per annum. The revising barrister decided that the cost of repairs must be deducted from the rent, for the purpose of ascertaining the yearly value, and consequently that A.'s interest was less than the value of 40*s.* by the year, and he expunged his name from the list. And the court held that he had decided correctly. Jervis, C. J., there says,—"The question is, what is the property worth? And the proper way to decide that, is, to ascertain what a tenant would give if he himself expended 4*l.* a year in repairs." Colvill, app., Wood, resp., 2 C. B. 210, 1 Lutw. Reg. Cas. 483, is to the same effect. [ERLE, C. J.—The rule, to be gathered from the cases, seems to be, that landlord's charges are not to be deducted, but that tenant's charges are.]

Milward, for the respondents.(*b*)—This is a question *of fact [*257 and not of law, and therefore not properly the subject of an

(*a*) See Sherlock, app., Steward, resp., antè, p. 21.

(*b*) The points marked for argument on the part of the respondents, were,—

"That the decision of the magistrate is correct: That an appeal under the statute 20 & 21 Vict. c. 43 does not lie in this case, the question being one of fact, viz. the real rental, and not one of law: That, by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 68, and the

appeal under this statute. By the 111th section of the 10 & 11 Vict. c. cclxi., the rate is to be assessed upon the annual value of the premises: and, in case of a composition under the 13 & 14 Vict. c. lxxx., s. 18, the owner is to be liable, and not the occupiers. The criterion of value is the *rent*, whatever the owner may choose to do with it. The question before the magistrate was, as to what was the rental. [ERLE, C. J.—You say the written contract between the parties is on the rental, and with a view to that alone; and that, for aught that appears, the council would not have entered into it upon any other footing.] Precisely so. Value is altogether rejected, and rent substituted. [WILLES, J.—The words "rent or value" in the 18th section of the 13 & 14 Vict. c. lxxx. would seem to apply to rent where the premises are occupied by a tenant, and to value when they are occupied by the owner.] If the bargain is upon the footing of rental, that was a question of fact, and not of law. And, the magistrate having found that the rental was as the corporation contend for, this court cannot interfere with his decision.

Aspinall, in reply.—The corporation have not chosen to exercise the power given them under the contract to amend the statement of the rental. [ERLE, C. J.—We should not feel disposed to send the case back on that ground. It was competent to the corporation to compound on the rental. Value being *often the subject of dispute, it is not unreasonable that they should substitute rental.] Under the 18th section of the 13 & 14 Vict. c. lxxx., the composition is to be upon the charges imposed by the 10 & 11 Vict. c. cclxi., s. 111, which are to be assessed upon the *annual value*, and not upon the *rental*.

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ERLE, C. J.—I am of opinion that our judgment must be for the respondents upon both points. In the first place, I think there was sufficient evidence of a composition. The parties clearly intended to compound under the provisions of the statute; and I think there was evidence enough before the magistrate to show that a binding composition was entered into. The second point made by Mr. *Aspinall* was not precisely the point that was urged before the magistrate. The question before him, and which he puts to us, is, whether, in stating in the schedule to the composition paper the annual value of the premises for the purpose of the composition, the appellant had a right to deduct from the amount received by him from the tenants the sum of 6*d*. per week in respect of the parish and other rates paid by him. Taking the composition paper to be the agreement of the parties, I see no reason why the appellant should claim that right. By the 18th section of the 13 & 14 Vict. c. lxxx., the composition is to be not less than three-fourths of the annual water-rent or charge upon the "yearly rent or value" of the premises. But all through the composition paper, the rental is assumed to indicate the value. The question of actual value is often complicated and difficult to get at: but the rental can always be ascertained beyond doubt. And I conceive that to be the basis of the contract between the parties. My judgment is founded upon the terms of the composition paper, which is before us.

Liverpool Corporation Waterworks (Amendment) Act, 1850, s. 23, the magistrate is the proper person to settle and determine the question of amount to be recovered, and that his decision is conclusive thereon: And that the decision of the magistrate, whether in law or fact, was correct, and the respondents were entitled under the terms of the composition to recover in respect of the actual rentals received by the landlord from the tenants, without taking into consideration how such rental was to be disposed of."

*WILLIAMS, J.—I am of the same opinion. As to the first question, I think there was sufficient evidence of a composition having been entered into. As to the rest, I think the composition-paper, which states the yearly rental, is a valid contract, and that the rental cannot be varied by the circumstance of the agreement between the landlord and the tenant for a deduction from the rent of 6*d.* per week on account of the poor and other rates. [*259

CROWDER, J.—I also think our judgment should be for the respondents. I think there was ample evidence that there was a composition. As to the second question, it seems to me to be difficult to give a precise answer to it. Looking at the schedule to the composition-paper, I see nothing about annual value. It refers to rental only. The real question to be decided is, whether the parties had a right to do as they have done. I think they had. It seems to me that the more convenient mode of entering into a composition is upon the rental. But it must be stated properly according to the fact. Here, 4*s.* 6*d.* and 3*s.* 6*d.* per week are put down, instead of 5*s.* and 4*s.*

WILLES, J.—I am of the same opinion. It seems to have been agreed on both sides that the rent should be taken to represent the value.

ERLE, C. J.—This being a fair and proper question for argument, there will be no costs. Appeal dismissed, without costs.

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*BEHN and Another *v.* KEMBLE and Others. *Nov.* 18. [*260

No action will lie for a false representation, unless the party making it knows it to be untrue, and makes it with the intention of inducing the plaintiff to act upon it, and the latter does so act upon it and sustains damage in consequence.

THIS was an action in the nature of deceit.

The first count of the declaration stated, that, before and at the several times thereinafter mentioned, the plaintiffs were the owners of certain goods and merchandise, to wit, of the value of 2000*l.*, and the defendants were the owners of certain other goods and merchandises, to wit, of the value of 2000*l.*; and that, before and up to the time of the loss thereinafter mentioned, the said goods and merchandises of the plaintiffs and defendants respectively were being conveyed on board a ship called the Eliza Warwick, then proceeding on a voyage, to wit, from Singapore towards London; and that the said ship, whilst she was proceeding on her said voyage with the said goods and merchandises on board thereof, was by storms and tempests, perils and dangers of the sea, brought into great distress, and was greatly damaged, and in danger of perishing and being lost and destroyed in the sea, wherefore the master of the said ship and the mariners thereof, for the general safety and preservation of the said ship, and of the said goods and merchandise of the defendants, and of the rest of the goods and merchandise on board the same, were necessarily obliged to and did then cast into and leave in the sea, among other goods and merchandise, a portion of the said goods and merchandise of the plaintiffs, and the same thereby became and were and still are wholly lost to the plaintiffs,

whereby the plaintiffs had incurred great loss, to wit, to the amount of 1200*l.*, and that the said goods and merchandise of the defendants were thereby saved and preserved from loss and damage, and afterwards were
*261] safely and securely delivered to the *defendants,—of all which premises the defendants afterwards had notice; and, by reason of the premises, and of the defendants being owners of the said goods and merchandises during the said voyage, and at the time when the said ship or vessel was so damaged and endangered as aforesaid, and being thereby benefited as aforesaid, they the defendants then became liable to contribute to the said loss so occasioned to the plaintiffs, in a general average, a large sum of money, to wit, 516*l.* 17*s.* 2*d.*, when they the defendants should be thereunto requested, whereof the defendants afterwards and before the commencement of this action had notice; yet the defendants, although requested, had not paid the said money, or any part thereof, to the plaintiffs.

The second count stated, that the plaintiffs and defendants being respectively the owners of the goods and merchandises respectively on board of the ship, as in the preceding count mentioned, and the other facts and circumstances having occurred, and the said loss having been sustained by the plaintiffs as in that count mentioned, and the defendants as such owners being liable to contribute to the said loss of the plaintiffs in a general average as therein also mentioned, thereupon, in consideration of the premises, the plaintiffs, by certain persons their agents in that behalf, the defendants, and the several other persons who were respectively owners of or interested in the goods and merchandises on board the said ship at the time of the happening of the said damage, then entered into and subscribed an agreement, which said agreement was and is as follows: "Whereas the barque or vessel Eliza Warwick, of 626 tons, whereof Edward Halliday is master, now in the port of London, in the prosecution of her late voyage from Singapore to London
*262] with a cargo of pepper, hides, and other merchandise, met a *great deal of bad and tempestuous whether, whereby she received damage and was obliged to throw a great part of the cargo overboard for the preservation of the said ship, and an average has arisen thereby on the said barque or vessel, her cargo, and freight: Now know ye that we the underwritten consignees or claimants of the cargo of the said barque do hereby agree, and bind and oblige ourselves, our heirs, executors, and administrators, respectively, to give him the true value of our respective interests in the said cargo, and to settle and pay the said Edward Halliday or his assigns our respective proportion of all such average as shall or may be hereafter adjusted on the said ship and her cargo and freight, agreeably to the customary mode of adjusting similar averages in London: And we do likewise agree to and with the said Edward Halliday, his executors and administrators, if required, to enter into and execute bonds or obligations in a sufficient penalty for referring the adjustment of the aforesaid average to the award or determination of proper and competent persons in London:" Averment, that, after the making of the said agreement, the defendants, in pursuance thereof, did give in the value of their interest in the said cargo, that is to say, of the said goods and merchandise on board the said ship whereof the defendants were the owners aforesaid, and the said average was adjusted on the said ship and her cargo and freight agreeably to the customary

mode of adjusting similar averages in London, and that, upon such adjustment, it appeared, among other things, that the defendants were liable and ought to pay for behoof of the plaintiffs, in respect of such loss as aforesaid, the sum of 516*l.* 17*s.* 2*d.*, of which the defendants had notice and were thereupon requested to pay the said sum to the plaintiffs or the said Edward Halliday for them; yet the defendants had not paid the said sum *of 516*l.* 17*s.* 2*d.*, or any part thereof, to the [*263 plaintiffs or the said Edward Halliday.

The third count stated that the plaintiffs were the owners of certain goods and merchandises, to wit, of the value of 10,000*l.*, on board a certain ship or vessel called the Eliza Warwick, and that all things having happened and been done to the said ship and cargo as in the first count mentioned, and a general average having arisen upon the said vessel and cargo and freight as therein mentioned, the defendants assumed and represented themselves to be the owners of certain goods and merchandises, to wit, of the value of 2000*l.*, on board the said vessel, and did, as such assumed owners as aforesaid, enter into and subscribe their names to the said agreement in the last count mentioned and set forth, and, in pursuance of the said agreement, and as such assumed owners, gave in the value of their assumed interest in the said cargo, and the said average was adjusted on the said ship and her cargo on the faith of and in accordance with the aforesaid representation of the defendants, and of their being the owners of the said goods and merchandise: and thereupon it appeared that the defendants as such owners were liable and ought to pay for behoof of the plaintiffs, in respect of such loss as aforesaid, the said sum of 516*l.* 17*s.* 2*d.*, of which the defendants had notice, and were thereupon requested to pay the said sum to the plaintiffs or the said Edward Halliday in the said agreement mentioned; yet the defendants had not paid the said sum of 516*l.* 17*s.* 2*d.*, or any part thereof, to the plaintiffs or the said Edward Halliday: Averment, that, in truth, the defendants were not the owners of the said goods and merchandises; and that they falsely and deceitfully assumed and represented themselves to be such owners as aforesaid; and that, by reason of the premises, they the plaintiffs *had relied [*264 upon and acted in the belief of such representation of the defendants, and that they were the owners of the said goods and merchandises, and the persons who by law would be chargeable with the payment of any contribution which might be payable by the owners of the said goods and merchandises, and having dealt with the owners of other goods included in the said adjusted average upon such belief, had lost and been deprived of the means of recovering by law from the real owners of the said goods and merchandises whereof the defendants assumed to be the owners as aforesaid, the contribution which would have been payable by such real owners to the plaintiffs in respect of such loss and average as aforesaid, and had been and were otherwise damnified. Claim, 1000*l.*

The defendants demurred to the third count, the ground of demurrer stated in the margin being, "that the count neither discloses any representation made by the defendants wilfully or under such circumstances as could reasonably be expected to induce the plaintiffs to alter their position, nor any alteration in the plaintiffs' position in consequence of the representations alleged." Joinder.

Mellish, in support of the demurrer.—The third count is bad. It

does not aver that the alleged representation was falsely and fraudulently made, or that it was made to the plaintiffs, or that they were induced to act upon it. In Thom *v.* Bigland, 8 Exch. 725,† the declaration stated that the defendants *falsely and fraudulently* deceived the plaintiff in this, that the defendants, as brokers of the plaintiff employed by him to purchase certain oil, falsely represented to him that they had purchased for him 25 tons of palm oil, to arrive by the Cemla, at the price
*265] of 30*l.* per ton; by *reason of which false representation, the plaintiff believing that the said 25 tons of palm oil had been so bought, and would be delivered to him in accordance with the terms aforesaid, entered into certain contracts, &c., whereas the defendants had not purchased the said quantity of palm oil, or any palm oil by the Cemla, on the terms aforesaid, but on different terms, viz. that the said 25 tons were sold and would be delivered to the plaintiff after and subject to the prior delivery of 800 tons of palm oil from the said vessel. The declaration then proceeded to state, that, by reason of the vessel not having more than 800 tons of the said palm oil on board, no part of the said 25 tons could be delivered to the plaintiff, whereby he was obliged to purchase a like quantity of palm oil at other places at a higher price. And it was held, that, as the declaration was founded upon deceit, in the absence of fraud the action could not be sustained. Parke, B., in giving judgment, says: "The law upon this point is now perfectly well settled, that, if the words 'falsely and fraudulently' can be struck out of a declaration, so as to leave a good cause of action, that may be done. The present case is, however, distinguishable; for, we cannot reject the averment that the defendants 'falsely and fraudulently' deceived the plaintiff, without striking out the whole cause of action. It is settled law, that, independently of duty, no action will lie for a misrepresentation, unless the party making it knows it to be untrue, or makes it with a *fraudulent* intention to induce another to act on the faith of it, and to alter his position, to his damage." In the notes to Chandelor *v.* Lopus (Cro. Jac. 2), in 1 Smith's Leading Cases, 4th edit. 142, the result of the authorities is thus summed up,—"With respect to actions upon the case for a false representation, although the declaration always imputes to the defendant fraud and an intent to deceive the
*266] plaintiff, and although it is expressly *laid down that 'fraud and falsehood must concur to sustain this action,' per Gibbs, C. J., Ashlin *v.* White, Holt 387, still, in order to prove such fraud as the law considers sufficient to sustain the action, it is only necessary to show that what the defendant asserted was false within his own knowledge, or asserted recklessly without any knowledge upon the subject,—per Maule, J., Evans *v.* Edmunds, 13 C. B. 775 (E. C. L. R. vol. 76), semble (see Pulsford *v.* Richards, 17 Beavan 87),—and with an intention to induce another to act on the faith of it, and alter his position to his damage: Thom *v.* Bigland, 8 Exch. 725,† where the report of the judgment of Parke, B., at p. 731, fourth line from the bottom, should be corrected by changing 'or' into 'and,' and striking out the word 'fraudulent'), and that it occasioned damage to the plaintiff: Foster *v.* Charles, 6 Bingh. 396 (E. C. L. R. vol. 19), 7 Bingh. 108 (E. C. L. R. vol. 20), 4 M. & P. 61, 741; Corbet *v.* Brown, 8 Bingh. 433 (E. C. L. R. vol. 21), 1 M. & Scott 85 (E. C. L. R. vol. 28). For which purpose it must appear that the plaintiff relied upon it: see Attwood *v.* Small,

6 Clark & Fin. 232; Vigers *v.* Pike, 8 Clark & Fin. 562; Shrewsbury *v.* Blount, 2 Scott N. R. 588, 2 M. & G. 475 ((E. C. L. R. vol. 40); though it should seem that the fact of a misrepresentation having been made, and a course pursued into which that misrepresentation was calculated to mislead, is primâ facie evidence that the plaintiff was misled by it: Watson *v.* Earl of Charlemont, 12 Q. B. 856 (E. C. L. R. vol. 64)." This declaration does not allege, neither can it be inferred, that the defendants were guilty of any improper act. They are alleged to have signed a document in which they are described as "consignees or claimants" of the cargo of the barque Eliza Warwick: but it is not alleged that they are not consignees.

Cleasby, contrà.—The third count is a good count in an action of deceit. By the agreement set out in the second count, the defendants bound themselves to pay *their proportion of general average adjusted in the way mentioned in respect of goods of which they [*267 gave in their names as owners; and that agreement was broken by their failure to pay the amount on demand. The agreement is not in such a form as to enable the now plaintiffs to sue upon it. [ERLE, C. J.—The plaintiffs, who are no parties to the agreement, want to avail themselves of it under colour of a charge of fraud and deceit. The attempt is an entirely new one.] The question is, whether the representation contained in the agreement was not made for the purpose of inducing the plaintiffs to act upon it. The decision of the Court of Exchequer in Langridge *v.* Levy, 2 M. & W. 519,† was affirmed in the Exchequer Chamber (4 M. & W. 337†) upon the ground upon which the plaintiffs rely here. The person who was injured by the bursting of the gun, and who sought to recover compensation for the injury he thereby sustained, was no party to the contract; yet he was held entitled to maintain the action, on the ground that it was contemplated at the time of the making of the contract that the warranty should be acted upon by him. [CROWDER, J.—The ground of the decision was that the gun was expressly bought for the son to use.] The word "fraudulently" does not hold so high a place in pleading as it formerly did.

ERLE, C. J.—I am of opinion that the third count is bad, and that the defendants are entitled to judgment upon this demurrer. That count does not allege any fraudulent representation by the defendants, nor any scienter: nor does it aver that the representation was made to the plaintiffs. It clearly will not do.

The rest of the court concurring,

Judgment for the defendants.

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*HATTON *v.* KEAN. *Nov.* 7. [*268

The plaintiff declared, that, after the passing of the 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, he had and still retained the sole liberty of representing and performing a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Much ado about Nothing," and that the defendant without his consent caused the said musical composition to be performed and represented at his theatre, &c.

Plea, that the alleged musical composition was part of a dramatic piece, to wit, &c., adapted to the stage by the defendant with the aid of scenery, dresses, the alleged composition, and

other music and accompaniments, the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward to compose the said musical composition as part of the said representation and dramatic piece, and as a mere accessory thereto, on the terms, that, in consideration of such reward, the said musical composition should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, &c., the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof; and that the alleged musical composition was composed by the plaintiff under and by virtue of the said employment, and upon the terms and for the purpose aforesaid:—

Held, on demurrer, that the plea was a good answer to the declaration; for that, under the circumstances, the defendant was to be considered as the author or proprietor of the whole entertainment.

THE first count of the declaration stated, that, after the passing of the statutes 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, and before and at the time of the representation and performance by the defendant thereinafter mentioned, the plaintiff had and still has the sole liberty of representing and performing at any place or places of dramatic entertainment in Great Britain, a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Much ado about Nothing;" nevertheless, after the passing of the said acts, and within twelve calendar months next before the commencement of this suit, while the plaintiff had such sole liberty as aforesaid, the defendant, on divers, to wit, four occasions, without the consent in writing of the plaintiff first had and obtained, caused the said musical composition to be performed and represented at a certain place of dramatic entertainment in England, to wit, at the Princess's Theatre, in Oxford Street, in the county of Middlesex, contrary to the said statutes, and to the great damage of the plaintiff; whereby and by force of the statutes in such
*269] case made and provided the *defendant had forfeited and become liable to pay to the plaintiff the sum of 40*s.* in respect of each and every such performance by the defendant.

The second count stated that also after the passing of the said statutes, and before and at the time of the representation by the defendant thereinafter mentioned, the plaintiff had and still has the sole liberty of representing and performing at any place or places of dramatic entertainment in Great Britain, a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Macbeth;" nevertheless, after the passing of the said acts, and within twelve calendar months next before the commencement of this suit, and while the plaintiff had such sole liberty as aforesaid, the defendant, on divers, to wit, two occasions, without the consent in writing of the plaintiff first had and obtained, caused the said last-mentioned musical composition to be performed and represented at a certain place of dramatic entertainment in England, to wit, the said Princess's Theatre, contrary to the said statutes, and to the great damage of the plaintiff; whereby and by force of the statute in such case made and provided the defendant had forfeited and become liable to pay to the plaintiff the sum of 40*s.* in respect of each of the said performances by the defendant.

The third count charged a like infringement of the plaintiff's copyright in respect of a certain musical composition composed by the plaintiff for the purpose of being performed at and during and as

part of the representation of Shakespeare's play of "The Merchant of Venice."

Third plea,—as to the first count,—that the alleged musical composition was part of a dramatic piece, to wit, Shakespeare's play of "Much ado about Nothing," *adapted to the stage by the defendant, with the aid of scenery, dresses, the alleged composition, and other music and accompaniments, the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward paid to him by the defendant in that behalf to compose the said musical composition as part of the said representation and dramatic piece, and as a mere accessory to the said dramatic piece, on the terms, that, in consideration of such reward, the said musical composition should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof; and that the alleged musical composition was composed by the plaintiff under and by virtue of the said employment and upon the terms and for the purpose aforesaid: and that the alleged representations and performances were representations and performances by the defendant of the said dramatic piece so designed and adapted as aforesaid with the aid of the said scenery, dresses, and the said musical composition, and other music and accompaniments. [*270

There were similar pleas to the second and third counts.

To each of these pleas the plaintiff demurred, the ground of demurrer stated in the margin being, "that the plea does not state any consent in writing given by the plaintiff to the defendant to perform the said musical composition." Joinder.

The following notice of objections was delivered with the pleas:—

*"1. That the alleged musical compositions were not musical compositions within the meaning of the Copyright Act, in which the plaintiff had no right of representation: [*271

"2. That each of them were mere accessories to and parts of certain dramatic pieces respectively of which the plaintiff was not the author, to wit, the composition mentioned in the first count was an accessory to and part of 'Much ado about Nothing,' the composition in the second count an accessory to and part of 'Macbeth,' the composition in the third count an accessory to and part of 'The Merchant of Venice:'

"3. That they were composed by the plaintiff as and for such accessories and parts; and that he was employed and paid by the defendant for such composition; and the plaintiff cannot separate them from such plays, and prevent the defendant from representing them as parts of such plays:

"4. That the said plaintiff composed them, namely, as the assistant and servant of the defendant in the bringing out of such plays; and that the defendant was the author and designer of the particular representations of the said plays combined with the said musical compositions:

"5. That the defendant was and is the author and has the right of representation of the said several musical compositions; and that the musical composition in the first count was first published on the 20th of November, 1858, at the Princess's Theatre, and that in the second count

on the 14th of February, 1853, at the said theatre, and that in the third count on the 12th of June, 1858, at the said theatre."

*272] *R. E. Turner*, in support of the demurrer.(*a*)—The *questions in this case are,—first, whether musical compositions are within the copyright acts,—secondly, whether this production of the plaintiff's is, under the circumstances of its composition, within the protection of those acts. The 1st section of the 3 & 4 W. 4, c. 15, secures to *the author* or his *assignee* the sole liberty of representing or causing it to be represented at any place of dramatic entertainment: and the 2d section enacts, that, "if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act or right of the author or his assigns, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment (within the limits mentioned in s. 1), any such production, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*, or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater

*273] *damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act." The provisions of that statute were by the 20th section of the 5 & 6 Vict. c. 45, extended to musical compositions, and the period of protection made co-extensive with that afforded to other literary productions. The pleas here are designed to raise the question which was left undecided in Russell *v.* Smith, 12 Q. B. 217 (E. C. L. R. vol. 64), viz., whether the protection given by the above-mentioned statutes to the author of any "dramatic piece or musical composition" against piracy by unauthorized performance, extends to musical compositions if they be not dramatic in their nature, or performed at a place of dramatic entertainment.(*b*) [*Huddleston*, Q. C., intimated that he should confine his argument to the other point, viz., that the plaintiff was not an author within the contemplation of the acts.] If the plaintiff is not the author of the composition in question, who is? Clearly not the defendant, any more than a publisher would be who employed an author to write a book for him. Dr. Johnson defines an author to be "he that effects or produces anything; the first writer of anything." Bailey describes him as "the composer or writer of a book, as contradistinguished from a compiler or a translator." And Webster says the term author "is appropriately applied to one who composes or writes a book or original

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"That the third, fourth, and fifth pleas does not show any right in the defendant to represent the musical compositions of the plaintiff mentioned respectively in those pleas without the written consent of the plaintiff:

"That the pleas state no such written consent, and no assignment to the defendant of the right of performing the said compositions:

"That one man cannot have the right of performing the musical compositions of another without such written consent or assignment:

"That the alleged terms on which the pleas state that the plaintiff composed the said music for the defendant could only be carried out by a written consent or assignment:

"And that, although the musical compositions were intended to be part of a dramatic piece, the defendant could not acquire a right to perform them as part of that dramatic piece until he had obtained the written consent of the plaintiff."

(*b*) And see Russell *v.* Bryant, 8 C. B. 836 (E. C. L. R. vol. 65).

work, and, in a more general sense, to one whose occupation is to compose and write books." In Shepherd *v.* Conquest, 17 C. B. 427 (E. C. L. R. vol. 84), the proprietors of a theatre employed an author to compose for them a dramatic piece, paying him a weekly salary and travelling expenses. There was no contract in writing, nor any assignment or registry of the copyright; but a mere verbal understanding that *the plaintiffs were to have the sole right of representing the piece in London: and it was held that the plaintiffs were not [*274 assignees of the copyright, nor had they such a right or interest therein as to entitle them to maintain an action for penalties under the 3 & 4 W. 4, c. 15, s. 2. In delivering the judgment of the court, Jervis, C. J., there says: "We do not think it necessary in the present case to express any opinion whether under any circumstances, the copyright in a literary work, or the right of representation, can become vested ab initio in an employer other than the person who has actually composed or adapted a literary work. It is enough to say, in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed. It appears to us an abuse of terms to say, that, in such a case, the employer is the author of a work to which his mind has not contributed an idea: and it is upon the author in the first instance that the right is conferred by the statute which creates it. We cannot bring our minds to any other conclusion than that Courtney, the person who actually made the adaptation, though at the suggestion of the plaintiffs, acquired for himself, as the author of the adaptation, and, so far as that adaptation gives any new character to the work, the statutory right of representing it; and that, inasmuch as the plaintiffs have no assignment in writing of that right, they cannot sue for an infringement of it." The 18th section of the 5 & 6 Vict. c. 45, is an express provision for vesting in the projector the copyright in articles contributed to encyclopædias, periodicals, and works published in a series, reviews, or magazines. The case of a patentee availing himself *of the suggestions of a workman, which may be relied on by [*275 the other side, has little or no analogy to the case of copyright. [BYLES, J.—The law upon that subject, as laid down by the present Chief Justice, in Allen *v.* Rawson, 1 C. B. 551 (E. C. L. R. vol. 50), has always been approved of. "I take the law to be," says his Lordship, "that, if a person has discovered an improved principle, and employs engineers, or agents, or other persons, to assist him in carrying out that principle, and they, in the course of the experiments arising from that employment, make valuable discoveries accessory to the main principle, and tending to carry that out in a better manner, such improvements are the property of the inventor of the original improved principle, and may be embodied in his patent: and, if so embodied, the patent is not avoided by evidence that the agent or servant made the suggestions of that subordinate improvement of the primary and improved principle." (*a*) The inventor retains the services and the brains of another.] In Lee *v.* Simpson, 3 C. B. 871 (E. C. L. R. vol. 54), an introduction to a pantomime,—that is, the only *written* part of the entertainment,—was held to be within the protection of the 3 & 4 W. 4, c. 15, s. 2.

(*a*) See Mr. Norman's very valuable little work on Patents, pp. 46, 47.

[CROWDER, J.—The musical composition here was merged in and became part of the entertainment designed and adapted by the defendant. ERLE, C. J.—It was not a thing that could be withdrawn from the general plan of the entertainment.] Could it be said that Mendelssohn's celebrated march in the Midsummer Night's Dream was not the subject of copyright?

*276] *Huddleston*, Q. C., contrà.(*a*)—The pleas afford a *complete answer to the charges contained in the declaration. The substance of the defence is this,—that the defendant, who had arranged certain of Shakespeare's plays with adjuncts of scenery, music, dancing, &c., employed artists and authors to aid him in carrying his design into effect; and, amongst others, the plaintiff was employed to compose and arrange the orchestral accompaniments: and the question is whether the property in the entire entertainment is not vested in the defendant

*277] as the author and designer of *it. In Leader *v.* Purday, 7 C. B. 4 (E. C. L. R. vol. 62), it was held that one who adapts words to an old air, and procures a friend to compose an accompaniment thereto, acquires a copyright in both words and accompaniment; and his assignee, in declaring for an infringement, may describe himself as the proprietor of the copyright in *the whole* composition. In giving judgment in Shepherd *v.* Conquest, adverting to the right of an employer to adopt and incorporate into his design the suggestions of servants, without detracting from the originality necessary to sustain a patent for the entire invention, Jervis, C. J., says: "To these might be added the case of Harfield *v.* Nicholson, 2 Law Journ. Ch. 90, 102, 2 Sim. & Stu. 1, in which Sir John Leach suggested the application of a similar principle to copyright, in the following words,—'I am of opinion, that, under the statute [8 Anne, c. 19], the person who forms the plan, and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own particular acquirements,—that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection who upon certain conditions contribute to it, is the author and proprietor of the work, if not within the literal expression, at least

(*a*) The points marked for argument on the part of the defendant, were as follows:—

"1. The Copyright Act does not give the exclusive right of representation to the composer of a musical composition which is a mere accessory to a dramatic piece by another author, composed as such, and not intended for representation by itself. Such a composition is not a musical composition within the act:

"2. The Copyright Act does not give the right of representation to a person employed and paid to compose a piece of music as a mere detail and accessory to the general design of another. Such a person is not an author within the meaning of the act:

"3. An accessory follows the nature of its principal; and, the defendant being the author of the general design of representing Shakespeare's plays with particular illustrations and accessories, and the compositions mentioned in the declaration being merely some of those illustrations and accessories, composed by the plaintiff for the defendant in carrying out the defendant's design, the defendant is the author of the particular representation of the plays designed and produced by him, and has the right of representing the plays with such compositions as parts thereof:

"4. Under the circumstances disclosed in the pleas, the representations by the defendant were not contrary to the intent of the acts 3 & 4 W. 4, c. 15, 3 & 4 W. 4, c. 27, s. 2, and 5 & 6 Vict. c. 45, or the right of the author, and therefore a consent in writing of the plaintiff was not necessary:

"5. That the notice delivered with the pleas pursuant to the statute must be deemed and taken to form part of and to be read with the pleas, and that the matters therein set forth show that the pleas are good, and that the plaintiff has no cause of action against the defendant."

within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally.' Also, it may be added, that, in the extract from Merlin, tit. *Contrefaçon*, § xi., the words 'author' and 'inventor' are said to be synonymous. And, indeeed, it has been contended that the productions of an author are to be dealt with in the same manner as the inventions of a workman, and that the former, like the latter, may become the property of an employer who hires the author's labour, and, as it was said, 'buys his brains.'" In Sweet *v.* Benning, 16 C. B. 459 (E. C. L. R. vol. 81), the plaintiffs were the proprietors of a weekly paper called *"The Jurist," [*278 which consisted principally of reports of decisions in the various superior courts of law and equity, supplied by barristers employed by the plaintiffs for that purpose under a verbal arrangement to the effect that they should furnish reports of such cases as they thought desirable for publication in The Jurist, upon the terms of being paid a given price per sheet,—the reporters making no express reservation of a right to publish the cases themselves, and there being no express stipulation that the copyright should belong to the plaintiffs,—nothing, in fact, being said upon the subject: and it was held that the plaintiffs had a copyright in the reports so furnished to The Jurist. In the course of the argument (p. 468), Maule, J., says,—"One might almost infer, without the aid of an act of parliament, that one who employs another to write an article, or to make anything else for him, is the owner or proprietor." And, in giving judgment, the same learned judge says: "I think, that, where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer,—subject, of course, to the limitation pointed out in the 18th section of the act." It is difficult, as was said in Shepherd *v.* Conquest, 17 C. B. 434 (E. C. L. R. vol. 84), to see why a different rule should prevail in the case of copyright from that which obtains in the case of patents for inventions. The 20th section of the 5 & 6 Vict. c. 45 enacts that "the provisions thereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical *composition, as if the same were therein expressly re-enacted [*279 and applied thereto." Now, substituting the right of representing for the right of publishing in s. 18, that section is exactly applicable to this case. Taking a fair and common sense view of the matter, it is obvious that the defendant and he alone can be considered the author of the entire entertainment; and that those who assist in the preparation of the accessories can no more acquire a separate and independent property in the portions severally contributed by them than the contributors to serials or newspapers can.

Turner, in reply.—It is assumed that Mr. Kean is the author of the *whole* of the entertainment: the argument must go the length of saying that that would be so, if, instead of one of Shakespeare's plays, the production of a modern author had been selected. As to the 18th section of the 4 & 5 Vict. c. 45, it would be a very forced construction

to apply it to a production of this sort. That section was meant to provide for the case of periodicals which are published as part of a general scheme, and at intervals. [BYLES, J.—The exception in s. 18 is not immaterial,—"save and except that *the first public representation* or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the *first publication* of any book."] The point is quite a new one, and it is one of very great importance to the members of the musical world.

ERLE, C. J.—I am of opinion that our judgment in this case must be for the defendant. I found my opinion entirely upon the facts stated in the plea, which are admitted by the demurrer. It is conceded that there has been no decision upon the precise point. It appears to me, *280] upon the facts thus admitted upon *the record, that the defendant was the author and designer of an entire dramatic representation or entertainment, with respect to part of which, a small accessory, viz., the music, he employed the plaintiff upon the terms set out in the plea,—that, in consideration of certain reward paid by the defendant to the plaintiff, the music should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof. I am of opinion that the music so composed by the direction and under the superintendence of the defendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant; and that, consequently, the defendant has violated no right of the plaintiff in causing it to be represented in the manner alleged. One cannot but perceive, that, if the plaintiff were right in his contention, the labour and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion. As between these parties, and under the circumstances, it seems to me very clearly that the musical composition in question became the property of the defendant, and that the plaintiff never was within the language of the statute the owner or proprietor thereof.

WILLIAMS, J., concurred.

CROWDER, J.—I am entirely of the same opinion. The whole of the *281] entertainment in question was *designed by Mr. Kean; and, in order to get up the details, it was necessary for him to get the assistance of the plaintiff and other persons to supply the numerous adjuncts necessary for the completion of the entire thing. The music in question having been composed by the plaintiff under an express engagement with the defendant, and for the defendant, and having been paid for by the defendant, the plaintiff never had any separate property therein, and consequently he could have no right to prevent the representation of it by the defendant.

BYLES, J.—I am of the same opinion. All I desire to add, is, that, in coming to this conclusion, we decide nothing that is inconsistent with the decision of this court in Shepherd *v.* Conquest, 17 C. B. 427 (E. C.

L. R. vol. 84), inasmuch as this case falls within the class as to which the court there expressly disclaimed giving any opinion.

Judgment for the defendant.

*LAW *v.* PARNELL. *Nov.* 2. [*282

Where a bill is endorsed in blank, it is competent to the holder to hand it over to a third person to sue upon it on his behalf.

The manager of an association established under the 7 & 8 Vict., c. 110, and also carrying on the business of a deposit and discount bank, bonâ fide received from a customer a bill of exchange endorsed in blank:—Held, that it was competent to him to sue upon it in his own name only, without the endorsement of the bank, although he was a partner and shareholder in the concern,—it appearing that it was a part of his duty as manager to keep possession of and to realize the securities which came to his hands in that character.

THIS was an action by the endorsee against the acceptor of a bill of exchange.

The declaration stated that one Thomas Burton, on the 17th of December, 1858, by his bill of exchange, now overdue, directed to the defendant, required the defendant to pay to him the said Thomas Burton, or to his order, 40*l.* 10*s.* three months after date, and the defendant accepted the same, and the said Thomas Burton endorsed the same to the plaintiff, but the defendant did not pay the same.

Pleas,—first, a traverse of the acceptance,—secondly, a traverse of the endorsement to the plaintiff,—thirdly, that the defendant accepted the said bill and delivered it to Burton, who took and received it from the defendant and always held it for a special purpose only, to wit, that he might get it discounted for the defendant and pay over to him the proceeds thereof on such discounting; that Burton did not get the bill discounted for the defendant, or pay over to him any of the proceeds thereof; that, except as aforesaid, there never was any consideration or value for the said acceptance; that there never was any consideration for the said endorsement of the said bill to the plaintiff; and that the plaintiff always held and now holds the said bill without value, and with full knowledge and notice of the premises. Issue.

The cause was tried before Crowder, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff was the manager and a shareholder in an association called The Life Assurance Treasury, which carried on the business of a deposit and discount bank. Burton, who *had an account with [*283
the bank, endorsed the bill in question, and handed it over to them to cover advances made to him. The plaintiff, whose duty it was as manager to hold bills and other securities on behalf of the bank, brought this action by authority of the directors.

On the part of the defendant, it was submitted, that, the bill having been delivered to the plaintiff as manager to hold for the bank, he alone had no right to sue, but all the other shareholders should have joined in the action.

The learned judge, reserving leave to move, left the case to the jury, who returned a verdict for the plaintiff.

Laxton now moved accordingly.—The plaintiff is not in a position to

maintain this action. He was not endorsee of the bill. To constitute a valid endorsement, there must be a delivery of the bill with the intention to vest the property in it. [BYLES, J.—In somebody.] Here, the bill was delivered to the plaintiff, not for the purpose of vesting the property in him, but in the bank, whose agent he was, and without whose endorsement he could not properly sue upon it. [ERLE, C. J.—It was endorsed and delivered to the plaintiff as manager of the bank, to do with it as was customary as such manager.] It was delivered to him for a collateral purpose. In Lloyd *v.* Howard, 15 Q. B. 995 (E. C. L. R. vol. 69), Lord Campbell says: "An endorsement requires that there shall be a delivery of the bill with an intent to make the person to whom it is endorsed the owner of the bill, a party to the bill, and transferee of the property in it. There is no endorsement, if the owner merely writes on the bill a direction to pay it to another person, and the other person gets possession without the holder's consent. Nor is there any
*284] endorsement, *though the holder give that person possession of the bill, if the delivery be merely for a collateral purpose, and without the intention to make him transferee of the property in the bill." That is fully borne out by the authority of Marston *v.* Allen, 8 M. & W. 494,† and numerous other cases. [WILLIAMS, J.—In Marston *v.* Allen, it was a pure question of pleading.] In Bell *v.* Lord Ingestrie, 12 Q. B. 317 (E. C. L. R. vol. 64), it was held that evidence that the alleged endorser wrote his name on the bill, and delivered it to the alleged endorsee, for the express purpose of retiring other bills, and on the express condition that they should be retired forthwith, and that such condition had not been complied with, was admissible to support a plea traversing the endorsement. [CROWDER, J.—There, as in all the other cases you cite, the bill had been obtained by fraud. Here, the bill came properly to the hands of the plaintiff as manager of the bank.] In Emmet *v.* Tottenham, 8 Exch. 884,† W., being the representative of a deceased holder of a bill of exchange accepted by the defendant, requested R., who had guarantied the payment, to see it paid. R. employed the plaintiff to sue upon it in his own name, and informed W. of the fact, saying that he required the bill to deliver to the plaintiff for that purpose. W. thereupon gave the bill to R., who, after making a copy, in his presence, gave it back, saying it would be safer in the hands of W. until it was wanted. The copy was then delivered to the plaintiff, who commenced the action. W. shortly afterwards delivered the bill to his own attorney, to take such steps as he might judge necessary, and get the money; and the bill was subsequently given to the plaintiff. The defendant pleaded a denial of the endorsement, and that the plaintiff was not the holder of the bill at the commencement of the suit. It was held, that, as the plaintiff had no interest in the bill, nor actual
*285] possession of *it, nor any constructive possession, inasmuch as neither R. nor W. was his agent, the defendant was entitled to a verdict upon both pleas. This was a company established under the 7 & 8 Vict. c. 110, from the operation of which banking companies are by s. 2 expressly excepted; consequently all the partners ought to have joined, or the plaintiff should have shown an endorsement according to the provisions of the 7 & 8 Vict. c. 113, s. 22.(*a*) [BYLES, J.—That

(*a*) Which enacts "that all bills of exchange or promissory notes made, accepted, or endorsed on behalf of the company, may be made, accepted, or endorsed (as the case may be) in any

was not necessary here, the endorsement by Burton being a blank endorsement. Where a bill is endorsed in blank, any bonâ fide holder may sue upon it.]

ERLE, C. J.—I am of opinion that there ought to be no rule in this case. It is clear upon the facts stated to us that the bank gave value for the bill, and that it was endorsed and delivered to their manager by the endorser with the intention of passing the property from the endorser to the endorsees. The bill being endorsed in blank, the bank had a right to hand it over to a third person to sue upon it, without endorsing it; and therefore the plaintiff, if he was the lawful holder of the bill, and had authority from the bank to do so, had a perfect right to sue upon it. And the evidence showed that he had such authority. As to the cases cited, there is no doubt, that, if the party has obtained the bill by fraud, or if it has come to his hands with a conditional right only, and he perverts it from the purpose for which he received *it, the delivery of the bill to him with such conditional right [*286 does not constitute a valid transfer, so as to make him an endorsee. In the case of Emmet *v.* Tottenham, 8 Exch. 884,† the plaintiff was not endorsee, neither had he possession of the bill. He had no interest in the bill: the owner of the bill never parted with it until after the commencement of the action. In Bell *v.* Lord Ingestrie, 12 Q. B. 317 (E. C. L. R. vol. 64), the endorsement was in the nature of a conditional endorsement: the bill was handed over for the express purpose of retiring other bills. As between the plaintiff and the defendant, therefore, there was no absolute endorsement, and therefore the plaintiff had no right to sue. As to the objection that the rest of the shareholders should have been joined, or the bill specially endorsed to the plaintiff by the bank, I think that point also fails, because the blank endorsement by Burton gave the bank power to authorize their manager to sue upon the bill; and there was ample evidence that they had done so.

WILLIAMS, J.—I am of the same opinion. It is plain that the bill was endorsed by a person who intended thereby to pass the property therein from himself to the bank; and that the property accordingly vested in them. Then, the bank, being the holders of a bill endorsed to them in blank, might lawfully constitute any third person the holder for the purpose of suing upon it: and the evidence showed that they did authorize the present plaintiff, their manager, to sue upon the bill on their behalf.

CROWDER, J.—I am of the same opinion. There clearly was evidence from which the jury were warranted in concluding that the plaintiff had authority from the persons to whom the bill was endorsed to sue upon it. There was no fraud or suspicion of fraud on *the part of [*287 the bank, or that they were not the bonâ fide holders for value: and they might well authorize their manager to sue.

BYLES, J.—I am of the same opinion. To whomsoever the bill was intended to be endorsed, it clearly was perfectly endorsed. It could only have been intended to be endorsed to the plaintiff or to his principals, the bank. If it was intended to be endorsed to the plaintiff,

manner provided by the deed of partnership, so that they be signed by one of the managers or directors of the company, and be by him expressed to be so made, accepted, or endorsed by him on behalf of such company," &c.

cadit quæstio: if to the bank, inasmuch as the endorsement was in blank, it was competent to them to hand over the bill to their agent or manager for the purpose of suing upon it on their behalf.

Rule refused.

SINGLETON v. THE EASTERN COUNTIES RAILWAY COMPANY. *Nov.* 4.

A child three years and a half old strayed upon a railway and had its leg cut off by a passing train:—Held, that, in the absence of any evidence to show that the child got there through some neglect or default on the part of the company, they were not responsible for the injury.

THIS was an action against the Eastern Counties Railway Company, to recover damages for an injury sustained by the plaintiff, an infant of the age of three years and a half, through the alleged negligence of the company.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term. The facts which appeared in evidence were as follows:—The plaintiff, with her brother, who was about five and a half years old, had by some means got upon the North Woolwich branch of the defendants' railway, and were sitting upon the parapet of a small wooden bridge on the railway, when a train came up and in passing cut
*288] off one of the plaintiff's legs. It appeared that the *train was coming up an incline, and that the driver saw the dangerous position of the children, but made no attempt to stop the engine, contenting himself with merely turning on his whistle. There was no evidence to show how the two children got to the place where they were, but it was supposed that they got through the fence at a place where a rail was off.

On the part of the defendants it was submitted that there was no evidence of negligence on the part of the driver, and that the child herself was contributory to the accident by being where she ought not to have been.

His Lordship nonsuited the plaintiff, reserving leave to move, if the court should be of opinion that there was evidence of negligence on the part of the company which ought to have been left to the jury.

Littler now moved accordingly.—There was negligence on the part of the driver of the engine in not stopping when he might have done so; and also negligence on the part of the company for allowing the rail to be off. A child of such tender age cannot be said to be contributory to an accident of this sort. In Lynch *v.* Nurdin, 1 Q. B. 29 (E. C. L. R. vol. 41), 4 P. & D. 672, the defendant negligently left his horse and cart unattended in the street: the plaintiff, a child seven years old, got upon the cart in play: another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt: and it was held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act; and that it was properly left to the jury whether the defendant's conduct was negligent, and the negligence caused the injury. Speaking of that case in Lygo *v.* Newbold, 9 Exch. 302, 305,† Parke.

B., *says: "The decision in Lynch *v.* Nurdin proceeded wholly upon the ground that the plaintiff had taken as much care as [*289 could be expected from a child of tender years,—in short, that the plaintiff was blameless, and consequently that the act of the plaintiff did not affect the question."

ERLE, C. J.—The plaintiff was wrongfully upon the railway: and, without saying anything to detract from the authority of the cases cited, I must confess I was wholly unable to discover any evidence of negligence on the part of the servants of the company.

WILLIAMS, J.—I also think there was no negligence made out on the part of the company. There was nothing to show how the children got on to the railway. All was mere conjecture and surmise.

The rest of the court concurring, Rule refused.

*GREEN *v.* THE LONDON GENERAL OMNIBUS COMPANY (LIMITED). *Nov.* 18. [*290

A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation.

Therefore, in an action against a company established for conveying passengers by omnibuses in the streets of London, charging that the company by its servants wrongfully, vexatiously, and maliciously did certain acts (describing them) with a view to, and which in the result did, obstruct and annoy the plaintiff in the conduct of a similar trade:—Held, that, as the acts complained of were connected with the object and purpose for which the company was incorporated, the company was responsible.

THIS was an action against the defendants for wrongfully and maliciously obstructing the plaintiff in his business of an omnibus proprietor.

The declaration stated, that, before and at the time of the committing the grievances thereinafter mentioned, the plaintiff carried on the trade and business of a carrier of passengers for hire in certain public streets, roads, and highways, to wit, &c., by means of certain omnibuses of the plaintiff drawn by horses and driven and conducted by the servants of the plaintiff, for the profit and benefit of the plaintiff, and which said omnibuses of the plaintiff had full liberty and right to run respectively from, &c., to, &c., and to stop for a reasonable time at all points and places on and along the said public streets, roads, and highways, for the purpose of taking up and putting down passengers, and at certain points and places in the said streets, roads, and highways where numerous passengers were accustomed to enter the omnibuses passing such points and places, the said omnibuses of the plaintiff and all other omnibuses passing that way were, by the police regulations then lawfully enforceable and enforced, permitted to wait for a certain space of time, to wit, for the space of four minutes, to look for passengers, unless by their so doing any actual obstruction to the thoroughfares or nuisance to the inhabitants near the places was caused thereby: Yet the defendants, well knowing the premises, but contriving and intending to injure, impoverish, and ruin the plaintiff, and to prevent him from carrying on his said business, at divers

*291] *times before this suit, *wrongfully, vexatiously, and maliciously* placed and drove in the public streets, roads, and highways aforesaid, certain other omnibuses and carriages just before and just behind the said omnibuses of the plaintiff, whilst the same, with the plaintiff's horses drawing the same, were plying for passengers for hire in the public streets, roads, and highways as aforesaid, and with which the plaintiff was then carrying on his said business, in such a manner as to hinder and prevent, frighten, and deter great numbers of persons from entering the plaintiff's said omnibuses and becoming passengers therein for hire, as they otherwise might and would have done, and so as to hinder and prevent the plaintiff from having the free use of the said streets, roads, and highways with his said omnibuses and horses in so large and ample a manner as he otherwise might and would have done, and so as to retard, delay, and stop the said omnibuses of the plaintiff, and so as greatly to obstruct and encumber the said highways, to the nuisance of the Queen's subjects then lawfully using the same: And further the plaintiff said that the defendants *wrongfully, vexatiously, and maliciously* drove and placed in the public streets, roads, and highways aforesaid, certain other carriages and omnibuses upon and against the said omnibuses and horses of the plaintiff, and upon and against the servants of the plaintiff then conducting the same, while the said omnibuses, with the plaintiff's horses harnessed to the same, and the plaintiff's said servants conducting the same, were plying and waiting for passengers for hire in the public streets, roads, and highways aforesaid, and with which the plaintiff was then carrying on his said business as aforesaid, in such a manner as thereby to bruise, damage, and injure the said omnibuses and horses of the plaintiff, and to prevent the doors *292] of the said *omnibuses from being opened, and to obstruct and block up the access of passengers into the said omnibuses of the plaintiff, and to hinder and disable the said servants of the plaintiff from freely and fully performing their duties to the plaintiff in the conduct and management of the said omnibuses of the plaintiff, and whereby they were so hindered and disabled as aforesaid accordingly: And the plaintiff further said that the defendants also, contriving and intending as aforesaid, at the several times aforesaid also *wrongfully, vexatiously, and maliciously*, in the said public streets, roads, and highways, thrust and pushed themselves, and caused their servants to and they did thrust, push, and place themselves between the said omnibuses of the plaintiff while plying and waiting for passengers as aforesaid in the way of the plaintiff's said business, and divers persons who were desirous to enter and get into and on to the same as passengers for hire, so as thereby to obstruct the entrance and access of such passengers into and upon the said omnibuses of the plaintiff, and to hinder, deter, and prevent them from entering the same or becoming passengers therein: And further, in continuation of this count, the plaintiff said that the defendants also contriving and intending as aforesaid, at the several times aforesaid, *wrongfully, vexatiously, and maliciously* insulted, hissed and assaulted, beat, and ill-used the plaintiff's servants in the said public streets, roads, and highways, while they were employed in driving, conducting, and managing the said omnibuses in the way of the plaintiff's said business, and were plying and waiting for passengers therewith in the said public streets, roads, and highways: And in continuation

of that count the plaintiff further said that the defendants, well knowing the points and places in the said respective roads at which the plaintiff's omnibuses, by the said police regulation in the introductory part of *that count mentioned, were permitted to remain for a [*293
certain space of time, to wit, for the space of four minutes as aforesaid, *wrongfully*, *maliciously*, *and vexatiously*, and for the express purpose of annoying the plaintiff and causing such an obstruction of the thoroughfares at the said points and places in the said public streets and roads as aforesaid as would induce and oblige the police there stationed to order off the omnibuses of the plaintiff from the said points and places before the said omnibuses had remained at the said points and places for the said space of time which by the police regulations aforesaid they were permitted to remain, and thereby to prevent passengers who, if the plaintiff's omnibuses had so remained, would have come and entered into and mounted upon the plaintiff's said omnibuses, from so doing, caused one or more of their, the defendants', omnibuses, drawn by their horses, and driven and conducted by their drivers and conductors, to precede and follow each omnibus of the plaintiff as such omnibus approached near to and arrived at each or any of the said points and places in the said public streets, roads, and highways, in such a manner as to cause such an obstruction to the thoroughfares at such points and places, and such a nuisance to the inhabitants near the said points and places, as would induce and oblige, and which did induce and oblige, the police there stationed to order and command that the plaintiff's omnibuses should move off from the said points and places in the said public streets, roads, and highways, before they had remained there for that space of time which but for the defendants' wrongful contrivance and conduct they otherwise might and would have done, and thereby they the defendants prevented numerous passengers from entering and riding upon the plaintiff's said omnibuses for hire, as they otherwise might and would have done: by reason of which said several *grievances in that count respectively mentioned, great numbers [*294
of persons were on the several days and times aforesaid hindered, deterred, and prevented from becoming passengers for hire by the plaintiff's said omnibuses, as they otherwise would have done, and the plaintiff's omnibuses and horses were greatly injured, &c., and the plaintiff was greatly damaged, hindered, and obstructed in carrying on his said business, &c., &c.

To this declaration the defendants demurred; and the plaintiff joined in demurrer.

Giffard (with whom was *Paterson*), in support of the demurrer.—The declaration alleges a variety of malicious acts done by the company with the intention of obstructing and injuring the plaintiff in carrying on his trade. Now, the gist of the action is the malicious intention; and a corporation cannot as such be actuated by malice. A corporation, according to Lord Coke,—Sutton's Hospital Case, 10 Co. Rep. 32 b,—"cannot treason, nor be outlawed, nor excommunicate, for they have no souls; neither can they appear in person, but by attorney; 33 H. 8, Br. Fealty. A corporation aggregate of many cannot do fealty, for, an invisible body can neither be in person, nor swear: Plowd. Comm. 213, and the Lord Berkeley's Case, 245: it is not subject to imbecilities, death of the natural body, and divers other cases."

The question is how far the old rule of law in this respect is modified by the recent decisions upon the subject. The most recent authority on the point is that of Whitfield *v.* The South Eastern Railway Company, 1 Ellis, B. & E. 115 (E. C. L. R. vol. 96), where it was held that a count against a railway company, being a corporation aggregate, for a malicious libel, is good on demurrer; for that a corporation aggregate
*295] may well, in its corporate capacity, *cause the publication of a defamatory statement under such circumstances as would imply malice *in law* sufficient to support the action. But there the judgment proceeded upon the ground that the occasion did not justify the publication, and therefore the law would infer malice. The judgment of the Exchequer Chamber in The Eastern Counties Railway Company *v.* Broom, 6 Exch. 314,† lays down the law in a way which distinguishes it from the present case. Patteson, J., there says: "Whatever may be the effect of the authorities in the Year Books, it has been expressly held, in modern times, that trespass will lie against a corporation aggregate for breaking and entering a close, and for seizing goods. This has been decided by several recent cases. Then the question is, whether trespass for assault and battery may lie against a corporation: and it has been contended that it cannot; for, it is said that it can neither beat nor be beaten. No doubt that proposition is true of it as respects its corporate capacity. But it does not therefore follow, that, if a corporation, by authority under seal, direct a servant to apprehend and imprison a particular person, an action for assault and battery cannot be maintained against the corporation. The learned counsel who appears for the plaintiffs in error must contend, in order to show that this declaration cannot be supported, that no such action would lie. But we are all clearly of opinion that it is not so, and that an action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act to be done, and it is done by their authority." All the acts that are here attributed to the company are acts which are necessarily *malicious*. The plaintiff must show that he has been injured by the defendants' placing their omnibuses before and behind his *mali-*
*296] *ciously*. Apart from malice, there is no cause of action. The *company in its corporate capacity could not authorize acts which are necessarily unlawful and malicious. The mere obstruction by the defendants of the plaintiff's enjoyment of a public way gives no ground of action: he must show a private and particular damage from an act of the defendants which is intentionally malicious or unlawful: Hubert *v.* Groves, 1 Esp. N. P. C. 148; Rose *v.* Miles, 4 M. & Selw. 101; Wilks *v.* The Hungerford Market Company, 2 N. C. 281 (E. C. L. R. vol. 29), 2 Scott 446 (E. C. L. R. vol. 30). Here, the plaintiff has suffered no grievance which is peculiar to himself. [BYLES, J.—What is the meaning of *maliciously?* ERLE, C. J.—A wilful violation of the law producing damage to an individual, must be presumed to be malicious.] To sustain this declaration, the plaintiff must show some wilful and unlawful and unauthorized interference by the defendants with some private right. [*Grant*, Amicus Curiæ, referred to the Quo warranto in Rex *v.* The City of London, 8 Howell's State Trials 1039, 1305, 1309, where the subject of malice in a corporation is much discussed. CROWDER, J.—Would this declaration be bad without the allegation of malice? Does the allegation mean anything more than

wilful?] It is submitted that the whole gist of the action is the malice. The defendants could not justify the specific acts charged without justifying the malicious intention: Gregory *v.* The Duke of Brunswick, 6 M. & G. 205 (E. C. L. R. vol. 46), 6 Scott N. R. 809.

F. Edwards, contrà.—The old doctrine as to corporations is no longer tenable. In the time of Lord Coke, there were only three different sorts of corporations,—viz. municipal corporations, ecclesiastical or spiritual corporations, and eleemosynary or charitable corporations. The exigencies of modern times, however, have called into existence a new description of corporation for trading purposes; and to these the old *law is altogether inapplicable; for acts done by them in furtherance of the purposes for which they are created, they are [*297 clearly liable, whether for a breach of contract or a tort. It has been expressly decided in very many modern cases that a corporation aggregate *can* be guilty of malice. In Yarborough *v.* The Bank of England, 16 East 6, Lord Ellenborough says: "In this case, the only question was whether an action of trover is maintainable against a body corporate; in other words, whether a corporation can be guilty of a trespass or a tort. As a corporation they can do no act, not even affix their corporate seal to a deed, but through the instrumentality and agency of others: they cannot as a corporation be subject to a capias or exigent (the process in trespass), because the remedies which attach upon living persons cannot be applied to bodies merely politic and of an impersonal nature. But, wherever they can competently do or order any act to be done on their behalf, which, as by their common seal, they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others. A corporation having the return of writs, or to which any writ, or a mandamus, for instance, is directed, is liable eventually to an action for a false return. The case of Agent *v.* The Dean and Chapter of St. Paul's, in this court about the year 1781, was an action for a false return to a mandamus respecting an election to a verger's place in that cathedral; and no objection was made that the action would not lie. Vidian's Entries, p. 1, is an action for a false return against the mayor and commonalty of the city of Canterbury for a false return to a writ of mandamus to restore an alderman to his precedency of place, &c. It states the mayor and corporation as *attached* to answer, and the return as falsely and *maliciously* made. The instances of actions against corporations for false *returns [*298 to writs of mandamus, which are so often directed to them, must be numberless, though I have not found many of them in the books of entries." It was expressly decided in The Eastern Counties Railway Company *v.* Broom, 6 Exch. 314,† that trespass lies against a corporation aggregate for an assault committed by their servant authorized by them to do the act. [CROWDER, J., referred to Chilton *v.* The London and Croydon Railway Company, 16 M. & W. 212,† where an action was brought against the company for assault and false imprisonment, and it was held to be sustainable.] In The Queen *v.* The Birmingham and Gloucester Railway Company, 3 Q. B. 223 (E. C. L. R. vol. 43), 2 Gale & D. 236, 9 C. & P. 478 (E. C. L. R. vol. 38), it was held that a corporation aggregate may be indicted by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute. If they may be indicted for a non-

feasance, surely an action will lie against a corporation for a wilful and malicious act. In The Queen v. The Great North of England Railway Company, 9 Q. B. 315 (E. C. L. R. vol. 58), it was held that a corporation aggregate may be indicted for a misfeasance. [ERLE, C. J.—The company is incorporated for certain purposes, viz. the constructing and working of a railway: it therefore becomes liable to actions for acts of nonfeasance or misfeasance within the scope of its incorporation. So, the assaulting a passenger for the purpose of enforcing obedience to a by-law or payment of a fare, might be said to be a matter within the scope of the company's incorporation. But the question here is, whether the acts of obstruction by means of the omnibuses of these defendants can be said to be acts done within the scope and object of the company's incorporation.] That, it is submitted, would be a question for the jury. Lord Campbell, in delivering the judgment of the court in Whitfield v. *299] The South Eastern *Railway Company, 1 Ellis, B. & E. 121 (E. C. L. R. vol. 96), says,—"Considering that an action of tort or of trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, although not by imprisonment, there may be great difficulty in saying that under certain circumstances express malice may not be imputed to and proved against a corporation. The authorities are collected and commented upon in Regina v. Great North of England Railway Company, in which it was held that a corporation aggregate may be indicted for cutting through and obstructing a public highway; and again in Eastern Counties Railway Company v. Broom, in which it was held, in error, that an action of trespass may be maintained against a corporation aggregate for an assault committed by their servant authorized by them to do the act. The cases to the contrary will be found to turn upon the defective evidence to prove the authority of the corporation to do the act complained of. Instances might easily be suggested where great injustice would be suffered by individuals if their remedy for wrongs authorized by corporations aggregate were to be confined to the agents employed." So, in Maund v. The Monmouthshire Canal Company, 4 M. & G. 452 (E. C. L. R. vol. 43), 5 Scott N. R. 457, 2 Dowl. N. S. 113, Car. & M. 606,† it was held that trespass lay against the company, a corporation aggregate, for the seizure by their agent of certain barges and coal for tolls alleged to be due to the company. [CROWDER, J.—There, the agent was clearly acting within the scope of the authority given him by the corporation.] It is scarcely possible to overrate the mischief which would result from holding companies of this sort inaccessible to the control of the law in respect of acts such as are here charged. The com- *300] plaint against these defendants is *not to be distinguished from that of the assault by the servant of the company in The Eastern Counties Railway Company v. Broom, or that of maliciously publishing the libel in Whitfield v. The South Eastern Railway Company. In Lawson v. The Bank of London, 18 C. B. 84 (E. C. L. R. vol. 86), it seems to have been assumed that a corporation aggregate may be sued for a wilful and malicious wrong. In Scott v. The Mayor, &c., of Manchester, 1 Hurlst. & N. 59,† 2 Hurlst. & N. 204,† the defendants were held responsible for the negligent doing of an act in the course of his duty by a servant of the corporation. It is difficult to see upon

what principle a corporation can be held to be liable for negligence, and yet not liable where the act is done wilfully and maliciously. "Maliciously" and "unlawfully" mean the same thing; and the declaration would have been equally good if the word "maliciously" had been omitted; for, it means no more than that the act is done with intention to do some injury to the person against whom the malice is directed. In the ordinary case of master and servant, the master is liable for the negligent or tortious acts of his servant in the execution of an authority conferred upon him. In Saunders on Pleading and Evidence 748, 2d edit., it is said: "A principal or master is in general liable for the tortious acts of his servants in all matters done by them in the exercise of the authority that he has given them, whether such servants be immediately retained by himself or by those whom he has employed; and, however remote the sub-agent may be whose unskilfulness or negligence, &c., was the cause of the injury, the liability may always be traced to the principal, from whom the authority moved: Bush *v.* Steinman, 1 B. & P. 404, 5 B. & C. 547 (E. C. L. R. vol. 11); Morley *v.* Gaisford, 2 H. Bl. 442, 3 Wils. 317. So, for the negligent driving of a carriage, or navigating a ship, even *whilst the servant was [*301 driving out of the direct road, and for his own purpose: Joel *v.* Morison, 6 C. & P. 501 (E. C. L. R. vol. 24)." [BYLES, J., referred to Mitchell *v.* Crassweller, 13 C. B. 237 (E. C. L. R. vol. 76).](a)

Giffard, in reply.—The whole declaration here charges a wilful and intentional annoyance and obstruction of the plaintiff. Lord Ellenborough, in Yarborough *v.* The Bank of England, 16 East 7, points to the very distinction now contended for. Wherever corporations, he says, "can competently do or order any act to be done on their behalf, which as by their common seal they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others." [CROWDER, J.—The defendants are incorporated for certain purposes. The question is whether they are not liable for acts which are done in abuse of their powers.] It would be hard to hold the shareholders liable for the wrongful acts of individuals who ought to be held personally responsible for giving unlawful orders.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that our judgment in this case ought to be for the plaintiff. This is an action against the defendants for wrongfully, vexatiously, and maliciously interfering with the plaintiff's rights, by causing their vehicles to be driven in such a manner as to obstruct and molest the plaintiff in the use of the highway. The declaration alleges various grievances of that general character. To this declaration there is a demurrer raising for our decision the question whether the action will lie. The ground of the demurrer *is that the declaration [*302 charges a wilful and intentional wrong, and that the defendants, being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles; and, the defendants are a company incorporated for the purpose of driving omnibuses, and therefore the acts alleged to have been done by them are all acts which are within the scope and object of their formation.

(a) And see Patten *v.* Rea, 2 C. B. (N. S.) 606 (E. C. L. R. vol. 89).

Unless the acts charged were wrongfully done, the plaintiff of course would have no ground of complaint. We are clearly of opinion that the action lies: and there are abundant authorities to warrant that opinion. The whole course of the authorities, from the case of Yarborough *v.* The Bank of England, 16 East 6, down to Whitfield *v.* The South Eastern Railway Company, 1 Ellis, Bl. & E. 115 (E. C. L. R. vol. 96),—which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on by Mr. *Giffard*,—that a corporation, having no soul, cannot be actuated by a malicious intention,—is more quaint than substantial. In coming to the conclusion we arrive at, we have no intention in the smallest degree to interfere with any of the decided cases; but, on the contrary, we found our judgment upon the numerous class of cases of which Yarborough *v.* The Bank of England,—where there is a most learned and elaborate argument of Lord Ellenborough, going fully into all the previous authorities,—is by no means the first, and which afford abundant examples of the application of the principle we now rely on. We may add that we dwell the less upon the grounds which have been
*303] urged by Mr. *Giffard* against the *maintenance of the action, by reason of the extreme mischief and inconvenience which would follow from our holding that these companies incorporated for the purpose of carrying on trade were exempt from liability for intentional acts of wrong. We think it extremely important that these companies should be held responsible where they admit they have intentionally done a wrongful act, and that those whom they have injured should not be driven to seek a doubtful remedy against their officers or servants, who may be wholly unable to answer the compensation which the jury may award to the injured party. For these reasons, we are of opinion that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

See Whitfield *v.* S. E. Railway Co., E., B. & E. 115 (E. C. L. R. vol. 96), and note.

Ex parte ELIZABETH MARIA WALLIS and ANN JULIET HAY.

Nov. 23.

A certificate of acknowledgment of a deed by a married woman under the 3 & 4 W. 4, c. 74, was allowed to be filed, where, in lieu of the form given in s. 84, the commissioners merely certified that the lady was, *as they believed*, of full age, &c.

HANNEN moved that the certificate of the acknowledgment of a deed by Mrs. Wallis and Mrs. Hay, two married women, taken at Toronto, Upper Canada, under the 3 & 4 W. 4, c. 74, might be received and filed.

The certificate did not follow the form given in the 84th section of the statute, which requires the commissioners taking the acknowledgment to certify that the party "was at the time of her acknowledging the

said deed, of *full age* and competent understanding;" but used the following words,—"And we do hereby certify that each of them the said Elizabeth Maria and Ann Juliet was, *as we the said commissioners believe*, at *the time of her acknowledging the said deed, of full age and competent understanding." [*304

The affidavit verifying the certificate, which was made by one of the commissioners, in like manner pledged the belief of the deponent that each of the persons making the acknowledgment was at the time of full age, &c.

There was, however, in addition, an affidavit by a gentleman residing at Toronto, deposing to his knowledge of Mrs. Wallis and Mrs. Hay, and stating that, "at the time of making such acknowledgment, each of them the said Elizabeth Maria Wallis and Ann Juliet Hay was of full age and competent understanding."

The learned counsel submitted that the 84th section did not require that the form therein given should be implicitly followed, but that it might be to the like effect, and that it was "subject to any alteration which might from time to time be directed by the Court of Common Pleas." [CROWDER, J.—That means, not that the form may be departed from in each case at pleasure; but that the court may from time to time by general rule vary it.] In the case of In re Luke, 1 Scott 80, 1 N. C. 265 (E. C. L. R. vol. 27), 3 Dowl. P. C. 112, the court allowed the form to be departed from, by omitting the words "of full age," the lady being at the time an infant.

BYLES, J.—The utmost the commissioners could certify would be as to their belief of the fact. If the certificate be ever so positive in its language, it in reality amounts to no more than a certificate that the party is, according to the belief of the certifying party, of full age. I must confess I do not see why this should not be held a sufficient compliance with the statute.

The rest of the court concurring, Fiat.

*MUMFORD and Another *v.* GETHING. *Nov.* 17. [*305

The plaintiffs, lace-merchants, carrying on business by means of travellers over certain districts in England, verbally agreed with the defendant, who was already in their service in another capacity, to travel for them over one of the districts, which they designated the "midland district," it being at the time understood that the terms of the engagement were to be reduced into writing. A few weeks after the defendant had started on the journey, the following agreement was sent to him, and he signed and returned it:—"To H. & W. Mumford,—In consideration of my entering upon your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so, with the understanding, that in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*:"—

Held, that extrinsic evidence was properly admitted to explain the nature of the employment and what was intended by the expression "the same ground;" that, such evidence being admitted (or, per Erle, C. J., and Crowder, J.,—Byles, J., dubitante,—without it), the contract was not void as an unreasonable restraint of trade; that, even without the evidence to explain the contract, there was ample consideration for the defendant's promise; and that a forfeiture of the 50*l.* was incurred by the defendant's travelling for another house in the same line "over the same ground," *after he had left the service of the plaintiffs.*

THIS was an action for the breach of a contract of service. The

declaration stated, that, in consideration that the plaintiffs, at the request of the defendant, would employ the defendant as their traveller in their trade of lace and sewed-muslin merchants, at a certain salary, the defendant agreed with the plaintiffs, amongst other things, that, if the defendant should travel for any other person or persons in the said trade on any part of the same ground over which the defendant should travel in the course of the said employment by the plaintiffs, the defendant would pay to the plaintiffs the sum of 50*l.*: Averment, that the plaintiffs did so employ the defendant as traveller as aforesaid, who, whilst and in the course of the said employment travelled over certain ground; that, before the commencement of the suit, all things had happened and occurred, and all times had elapsed which it was necessary should occur, happen, and elapse to entitle the plaintiffs to sue in this action for the defendant's breach hereinafter mentioned of the said promise; and that the plaintiffs had always been ready and willing to do all things which it ever was necessary they should be ready and willing to do to entitle them to sue the defendant in this action for the said breach of promise: Breach, that the defendant did, after the making of
*306] the said *agreement, travel for a certain other person in the said trade on and over a certain part of the said ground over which the defendant travelled in the course of the said employment by the plaintiffs, yet that the defendant had not in pursuance of his said promise paid to the plaintiffs the said sum of 50*l.*, or any part thereof, whereby the plaintiffs were much injured and damnified, &c.

Pleas,—first, that the defendant did not agree as alleged,—secondly, that the defendant did not, after the making of the said agreement, travel for any other person in the said trade on any part of the same ground over which the defendant travelled in the course of the said employment by the plaintiffs,—thirdly, that, at the time of making the said agreement, the defendant was a traveller in the said trade of a lace and sewed-muslin merchant, and had no other means of earning his living, and that he was employed by the plaintiffs as their traveller in the said trade, to travel all over the kingdom; and that the said agreement was an unreasonable and general restraint of the defendant's trade, and entirely prohibited and restrained the defendant from exercising the said trade after the defendant ceased to be employed by the plaintiffs; and that the plaintiffs were not by the said agreement bound, nor did they agree, to employ the defendant during his life; and that they had ceased to employ the defendant before he travelled for the said other person as in the declaration mentioned. Issue thereon.

The cause was tried before Crowder, J., at the second sitting in London in Trinity Term last, when the following facts appeared in evidence:—The plaintiffs, who were lace-merchants carrying on business in Milk Street, Cheapside, and were in the habit of sending travellers to various parts of England to procure orders, assigning to each a particu-
*307] lar circuit or district, in *March, 1858, appointed the defendant, who was already in their employ as a clerk or assistant in the warehouse in London, to go what was called the Midland journey, at a yearly salary of 50*l.*, with an allowance of 8*l.* 15*s.* per week for expenses. The engagement was at first a verbal one, but it was understood at the time that it was to be reduced into writing; and, accordingly, after the defendant had been a short time gone on his first journey,

the following memorandum was sent to him for his signature, accompanied by a list of the several towns to which he was to go, and the names of the plaintiffs' customers at those respective places:—

"April 30th, 1858.

"To H. & W. Mumford.

"Gentlemen,—In consideration of my entering upon your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so; with the understanding, that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*"

This document was returned to the plaintiffs duly signed by the defendant; and he continued in their employ as traveller until the early part of 1859, when he engaged himself as traveller for another house in the trade over the same district. The plaintiffs thereupon brought this action to recover the stipulated sum of 50*l.*

On the part of the defendant it was submitted,—first, that the agreement was without consideration, the defendant being already in the plaintiffs' employ, and the custom of the trade requiring a month's notice to put an end to a contract of service,—secondly, that there had been no breach, the latter part of the agreement being limited to the time during which the defendant might continue in the plaintiffs' employ,—*thirdly, that, if the agreement operated beyond the period of the defendant's service, it was illegal and void as being [*308 an unreasonable restraint of trade, unlimited both as to time and space,—fourthly, that parol evidence was inadmissible to show that the agreement was confined to the "midland journey," and that, if the agreement could be so construed, there was a variance.

The learned judge offered to leave it to the jury to say whether or not the agreement had reference specially to the midland journey, but the counsel for the defendant declined to avail himself of that offer; and a verdict was taken for the plaintiff for the damages claimed,—leave being reserved to the defendant to move for a nonsuit upon the grounds urged by him; and leave also being reserved to the plaintiffs to amend the declaration if necessary.

O'Malley, Q. C., having accordingly obtained a rule nisi,

Hawkins, Q. C., and *Prentice* now showed cause.—There was ample consideration for this agreement. It is true, the defendant was already in the plaintiffs' service in another capacity; but they might have dismissed him on a month's notice if he had declined to enter into the new arrangement. A somewhat similar objection was urged in Norton *v.* Powell, 4 M. & Gr. 42, 47 (E. C. L. R. vol. 43), where it was said arguendo, "the consideration is not truly stated; it is alleged in the declaration that the consideration was, that the plaintiff 'would then engage' Tarrand, whereas in fact he had been previously engaged by him, and the real consideration was, that he would *continue* him in his service, and should have been so stated." But Cresswell, J., disposed of the objection by saying, "The plaintiff avers that he *did afterwards engage Tarrand in his service: why did not the defendant [*309 traverse that allegation if it was incorrect? By not doing so, he has admitted it." Here, the allegation of employment is not traversed.

Then it is said that the agreement is limited to restraining the

defendant from travelling for any other house whilst he travelled for the plaintiffs. That, however, is not the fair and natural construction of the agreement. It would be idle to limit it to the time during which the defendant should be in the plaintiffs' employ; he was already bound to occupy the whole of his time in their service so long as the engagement lasted. It clearly was intended to be unlimited in point of time.

The parol evidence was offered and received, not for the purpose of adding to or varying or in any way qualifying the terms of the agreement, but merely for the purpose of showing to what state of things the agreement was intended to be applied. It is necessary to give parol evidence in almost every case in order to show what it is that the parties are contracting about. In Macdonald *v.* Longbottom, 28 Law J., Q. B. 293, the defendant, by a contract in writing, purchased of the plaintiffs, who were farmers, a quantity of wool, which was described in the contract simply as "your wool." Some time previously a conversation had taken place, in which the plaintiffs stated that they had a quantity of wool, consisting partly of their own clip, and partly of wool which they had contracted to buy of other farmers, and that altogether it amounted to "2300 stones, 100 stones more or less." The quantity ultimately tendered was 2700 stones, and the defendant refused to receive it. In an action for not accepting the wool, it was held by Lord Campbell and Erle, J., that the conversation was admissible in evidence for the pur-
*310] pose of explaining what the parties meant by *the term "your wool;" but that the quantity expressed by the plaintiffs formed no part of the contract, which was complete on the face of the writing,—by Wightman, J., that the conversation was admissible in evidence, and that the quantity of wool therein described became part of the contract, so that the defendant was not bound to receive the larger quantity tendered. Nearly all the authorities were there cited: and Erle, J., in giving judgment, says: "I assume that the plaintiffs must prove a written contract, and that that contract must contain all the material terms. Here I think that it is most explicit: the defendant says by the letter of the 5th of September, 'I will buy your wool at 16*s.* per stone,' &c. Then, by the practice of the courts, which has been invariably followed, evidence must be admitted to identify the subject-matter of the contract. It is the duty of the judge to construe the writing, and he cannot have judicial knowledge of the subject-matter of the contract. Suppose that I sell 'all my wool which I have on Dale Farm,' evidence must always be admissible to show that the wool which was delivered was the wool on Dale Farm. In cases of that kind, evidence to explain must always be admissible." In Taylor on Evidence, § 1082, it is said: "It may be laid down as a broad and distinct rule of law, that *extrinsic evidence* of every *material fact*, which will enable the court to *ascertain the nature and qualities* of the subject-matter of the instrument, or, in other words, *to identify the persons and things* to which the instrument refers, must of necessity be received. Whatever be the nature of the document under review, the object is to discover the intention of the writer as evidenced by the words he has used; and, in order to do this, the judge must put himself in the writer's place, and then see how the terms of the instrument affect the property or subject-
*311] matter. With *this view, extrinsic evidence must be admissible of all the circumstances surrounding the author of the instru-

ment." The rule is laid down thus in the opinion of the judges delivered by Tindal, C. J., in Shore *v.* Wilson, 9 Clark & F. 566,—"the true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, *or any difficulty as to their application under the surrounding circumstances*, the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for, both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party."

If the parol evidence was properly admitted, the contract clearly was not an unreasonable restraint of trade. A covenant restraining trade within particular limits is lawful,—per Lord Eldon, in Morris *v.* Coleman, 18 Ves. 438; provided it be not unreasonable or larger than the fair security of the covenantee calls for: see the cases collected in Avery *v.* Langford, 1 Kay 663. The law on the subject is well expounded by Parke, B., in Mallan *v.* May, 11 M. & W. 653, 665.† "The rule," he says, "as laid down by Lord Macclesfield and Lord Chief Justice Willes,—Master, &c., of Gunmakers *v.* Fell, Willes 388, —is, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad; but, if the circumstances are set forth, that presumption may be excluded, and the court are to judge of those *circumstances, and determine whether the contract be valid or not: Mitchell *v.* Reynolds, 1 P. Wms. 196. 'Contracts [*312 in restraints of trade are, in themselves, if nothing shows them to be reasonable, bad in the eye of the law,'—per Tindal, C. J., in Horner *v.* Graves, 7 Bingh. 744 (E. C. L. R. vol. 20), 5 M. & P. 768. Therefore, if there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averments showing circumstances which rendered such a contract reasonable, the instrument is void. Such are the cases cited in Prugnell *v.* Gosse, Aleyn 67, and the case of The Tailors of Exeter *v.* Clarke, 2 Show. 350, and Claygate *v.* Batchelor, Owen 143; Year Book, 3 H. 5, fo. 5. But, if there are circumstances recited in the instrument (or probably if they appear by averment), it is for the court to determine whether the contract be a fair and reasonable one or not: and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice pro tanto of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of goodwill, and offers an

encouragement to trade, by allowing a party to dispose of all the fruits
*313] of his industry: Prugnell *v.* Gosse, Aleyn 67; Broad *v.* Jollyfe, *Cro. Jac. 596; Jelliet *v.* Broad, Noy 98. And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession within certain limits: Chesman *v.* Nainby, 2 Ld. Raym. 1456, 2 Stra. 739. In such a case the public derives an advantage in the unrestrained choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business. It is justly observed by Lord Wynford, in giving the judgment of the court in Homer *v.* Ashford, 3 Bingh. 326 (E. C. L. R. vol. 11), 11 J. B. Moore 91 (E. C. L. R. vol. 17), that 'it may often happen that individual interest and general convenience render engagements not to carry on trade or act in a profession in a particular place, proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is, to encourage rather than cramp the employment of capital in trade, and the promotion of industry.'" The real question in all these cases is, what is reasonable for the employer's protection. Here, the restraint is limited to the plaintiffs' trade on the midland journey. In Bunn *v.* Guy, 4 East 190, the party, an attorney, covenanted to abstain from the exercise of his profession during his whole life in London or within 150 miles thereof, and yet that was held not to be unreasonable.

As to the alleged variance,—if the parol evidence was properly admitted, it would be idle to argue that point, there being leave reserved to amend.

*314] **O'Malley* and *Grant*, in support of the rule.—There was no consideration for the agreement declared on. The defendant was already in the employ of the plaintiffs, and his service could only be legally determined by a month's notice. The second contract, therefore, gave the defendant no greater advantage than he enjoyed under the first. If the real consideration was, that the plaintiffs would *continue* the defendant in their employ, the declaration should have so stated.

If the court think the parol evidence was admissible, it may be that the restraint was not unreasonable, so as to make the contract void. But the contract was, to restrain the defendant from travelling for any other house in the same trade during the time he continued in the employ of the plaintiffs. There was therefore no breach.

As to the restraint of trade,—there are three classes of cases where covenants in partial restraint of trade have been permitted,—one, in the case of a purchase of a goodwill, because it would be unjust and unreasonable to permit the vendor to set up the same trade within a competing distance of his vendee,—the second, that of a retiring partner, who may reasonably contract not to carry on the trade so as to interfere with the interests of the continuing partner,—the third is the ordinary case of master and servant. All restraints of trade are prima

facie void. In the case of The Tailors of Ipswich *v.* Sheninge, 11 Co. Rep. 53 a, it was resolved that "at common law, no man could be prohibited from working at any lawful trade." The cases of The Master, &c., of Gunmakers *v.* Fell, Willes 388, Horner *v.* Graves, 7 Bingh. 735 (E. C. L. R. vol. 20), 5 M. & P. 768, and Mallan *v.* May, 11 M. & W. 653,† also show that general restraints of trade are discountenanced by the law. In Warde *v.* Byrne, 5 M. & W. 548,† a covenant not to *follow or be employed in the business of a coal-merchant whilst in the plaintiff's employ, or within nine months [*315 after, without limit as to space, was held to be void. Here, there is no limit as to time: the defendant would be bound for life, even though the plaintiffs should die or discontinue business; and, unless the parol evidence was properly received, there is no limit as to space. [ERLE, C. J.—The objection that the restraint was not put an end to by the plaintiffs' death or retirement from business was unsuccessfully urged by me in Hitchcock *v.* Coker, 6 Ad. & E. 438 (E. C. L. R. vol. 33), 1 N. & P. 796 (E. C. L. R. vol. 36), in the Exchequer Chamber. In giving the judgment of the court in that case, Tindal, C. J., says: "Where the question turns upon the reasonableness or unreasonableness of the restriction of the party from carrying on trade or business within a certain space or district, the answer may depend upon various circumstances that may be brought to bear upon it, such as the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on; with the knowledge of which, and other circumstances, a judgment may be formed whether the restriction is wider than the protection of the party can reasonably require. But, with respect to *the duration* of the restriction, the case is different. The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held to be illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill considered in those various points of view, is altogether destroyed. If, therefore, it is not unreasonable, as undoubtedly it is not, to prevent a servant from entering into the same trade in the same town in which his master lives, so long as the *master carries on the trade there, we cannot [*316 think it unreasonable that the restraint should be carried further, and should be allowed to continue, if the master sells the trade, or bequeaths it, or it becomes the property of his personal representative; that is, if it is reasonable that the master should by an agreement secure himself from a diminution of the annual profits of his trade, it does not appear to us unreasonable that the restriction should go so far as to secure to the master the enjoyment of the price or value for which the trade would sell, or secure the enjoyment of the same trade to his purchaser, or legatee, or executor. And the only effectual mode of doing this appears to be, by making the restriction of the servant's setting up or entering into the trade or business within the given limit co-extensive with the servant's life." CROWDER, J.—In Mallan *v.* May, the restriction was during the lifetime of the covenantor.(*a*)] The restraint,

(*a*) As also in Bunn *v.* Guy, 4 East 190, Wickens *v.* Evans, 3 Y. & J. 318,† Hitchcock *v.* Coker, 6 Ad. & E. 438 (E. C. L. R. vol. 33), 1 N. & P. 796 (E. C. L. R. vol. 36), Nicholls *v.* Stretton, 10 Q. B. 346 (E. C. L. R. vol. 59), 7 Beavan 42, Sainter *v.* Ferguson, 7 C. B. 716.

therefore, is infinitely larger than any fair requirement of the plaintiffs will justify. [CROWDER, J.—The restraint was very large in Bunn v. Guy, 4 East 190,—for the lifetime of the covenantor, and the limit, London and 150 miles from thence,—and yet it was held not to be unreasonable.] In Horner v. Graves, Tindal, C. J., says: "Whatever *317] restraint is larger than *the necessary protection of the party with whom the contract is made, is unreasonable and void, as being injurious to the interests of the public, on the ground of public policy." So, in Tallis v. Tallis, 1 Ellis & B. 391, 410 (E. C. L. R. vol. 72), Lord Campbell says,—"According to the tenor of the later decisions, the contract is valid, unless some restriction is imposed beyond what the interest of the plaintiff requires." In Ward v. Byrne, Parke, B., in delivering judgment, says: "Where a limit as to space is imposed, the public on the one hand do not lose altogether the services of the party in the particular trade: he will carry it on in the same way elsewhere: nor within the limited space will they be deprived of the trade being carried on, because the party with whom the contract is made will most probably within those limits exercise it himself. But, when a general restriction, limited only as to time, is imposed, the public are altogether losers for that time of the services of the individual, and do not derive any benefit whatever in return: and, looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a total restriction of trade limited only as to time." [BYLES, J.—Do you find any case showing that the absence of a limitation in point of time would make the agreement bad, where the restraint is not too large in point of space? CROWDER, J., referred to Wickens v. Evans, 3 Y. & J. 318.†]

Then, as to the admissibility of the parol evidence,—It is a clear and indisputable proposition of law, that parol evidence is not admissible to control or contradict or extend the meaning of a written contract. The opinion of Tindal, C. J., in Shore v. Wilson, 9 Clark & F. 566, 567, shows clearly the limit of the rule as to the reception of parol evidence. [BYLES, J.—The case of Macdonald v. Longbottom, 28 Law J., Q. B. *318] 293, comes very near to the present.] In Sotilichos v. Kemp, 3 *Exch. 105,† in an action for refusing to accept a cargo of linseed which the plaintiff had sold to the defendant, and which was expected to arrive by a certain vessel, "fourteen days to be allowed for the delivery of the said seed from the time of the ship's being ready to discharge after its arrival," evidence was offered to show what the parties intended by the period assigned for the delivery of the cargo: and it was held, that, in the absence of any usage or evidence to raise an ambiguity as to the terms of the contract, such evidence was properly rejected. Gorrissen v. Perrin, 2 C. B. N. S. 681 (E. C. L. R. vol. 89), shows the limit of the admissibility of evidence of this sort. Here, the only use of the parol evidence was, to vary the terms of the contract:

(E. C. L. R. vol. 62), Atkyns v. Kinnier, 4 Exch. 776,† and Tallis v. Tallis, 1 Ellis & B. 391 (E. C. L. R. vol. 72).

In Gale v. Reed, 8 East 80, Williams v. Williams, 2 Swanst. 253, Wallis v. Day, 2 M. & W. 273,† Rolfe v. Rolfe, 15 Simons 88, Price v. Green, 16 M. & W. 346,† Pemberton v. Vaughan, 10 Q. B. 87 (E. C. L. R. vol. 59), Elves v. Crofts, 10 C. B. 241 (E. C. L. R. vol. 70), Turner v. Evans, 2 De Gex, M'N. & G. 740, and Horner v. Graves, 7 Bingh. 735 (E. C. L. R. vol. 20), 5 M. & P. 768, the restriction was during the life of the *vendor*.

it was not offered to show that words were used in a particular sense, or to explain a mercantile usage, or a term of art or science.

ERLE, C. J.—I am of opinion that this rule should be discharged. The first question is, whether there was any consideration for the defendant's entering into the agreement upon which the action is brought. The words are,—"In consideration of my entering into your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so, with the understanding that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*" The circumstances under which the agreement was entered into show a good consideration for making the agreement. The defendant, being already in the plaintiffs' employ in one capacity, agreed to enter into it in another capacity, viz., that of traveller. The agreement for this was at first a verbal one, but with an understanding that it was afterwards to be reduced into writing. When that was done, and the agreement [*319 *signed, the employment in the new capacity became complete. The defendant having entered upon his new duties as traveller, and started upon a journey, the agreement was, pursuant to the original understanding, reduced into writing, and sent down to him, and he signed it. The employment as traveller was at first only inchoate, and became perfected when the agreement was so signed. If, when the agreement was tendered to him, the defendant had declined to sign it, the plaintiffs might have refused to continue him in their employ, it being part of the original stipulation that the contract should be put into writing. I therefore think the objection as to the want of consideration for the contract fails.

Then it is said that the contract is void as being in restraint of trade. I am of opinion, that, if the case had been presented altogether without parol evidence, the contract would have been perfectly valid, the engagement being limited in point of space, which prevents it from being void on the ground of public policy. The plaintiffs were at liberty to send the defendant into any part of England, which for the convenience of their trade they had divided into districts. I entirely dissent from the notion thrown out by the defendant's counsel that agreements of this sort are to be discouraged as being contrary to public policy. On the contrary, I think that contracts in partial restraint of trade are beneficial to the public, as well as to the immediate parties; for, if the law discouraged such agreements as these, employers would be extremely scrupulous as to engaging servants in a confidential capacity, seeing that they would incur the risk of their taking advantage of the knowledge they acquired of their customers and their mode of conducting business, and then transferring their services to a rival trader. It appears to me to be highly important that persons like *this defendant should [*320 be able to enter into contracts of this sort, which will afford some security to their employers that the knowledge acquired in their service will not be used to their prejudice. I think the doctrine laid down by Parke, B., in Mallan *v.* May, 11 M. & W. 665,† is a correct exposition of the law upon this subject. "The public," he says, "derives an advantage in the unrestrained choice which such contracts give to the employer of able assistants, and the security they afford that the master will not withhold from the servant instruction in the secrets of

his trade, and the communication of his own skill and experience, from the fear of his afterwards having a rival in the same business." And the learned Baron afterwards adds: "It is justly observed by Lord Wynford, in giving the judgment of the court in Homer *v.* Ashford, 3 Bingh. 326 (E. C. L. R. vol. 11), 11 J. B. Moore 91 (E. C. L. R. vol. 22), that it may often happen that individual interest and general convenience render engagements not to carry on trade or act in a profession in a particular place proper; that engagements of this sort between masters and servants are not injurious restraints of trade, but securities necessary for those who are engaged in it; and that the effect of such contracts is, to encourage rather than cramp the employment of capital in trade, and the promotion of industry." I take it that a person in the position of this defendant is perfectly competent to judge whether or not it will be to his interest to enter into such a contract; for, we find that very soon after he has entered into it he transfers his services to another employer in the same business, and solicits orders for him over the very same ground over which he had been engaged to travel for the plaintiffs. I therefore think there is abundant ground, without the introduction of parol evidence, for holding that this contract was sufficiently limited in
*321] point of space to *make it a valid contract, and to exclude it from the decisions which have held such contracts bad as being an undue and unreasonable restraint of trade.

But I am further clearly of opinion that the parol evidence which was objected to was admissible to apply the contract. It was not offered for the purpose of varying or altering the contract, or of putting a different sense and construction upon its language from that which it naturally bore, but for the purpose of showing the circumstances under which such wide words were used, and of applying them according to the intention of the parties. The agreement begins,—"In consideration of my entering upon your employ." These words are perfectly vague and unintelligible, until explained by the parol evidence, which showed that the parties at the time of making the agreement contemplated that the defendant was to enter into the service of the plaintiffs in the capacity of traveller in the lace business on one of the six circuits or journeys into which they had thought fit to divide the counties over which their travellers solicited orders for them, viz., on the midland journey, and that the written contract was the result of previous conversation and arrangement between the parties to that effect, to which conversation and arrangement it clearly has reference. This view is entirely in accordance with Macdonald *v.* Longbottom, 28 Law J., Q. B. 293, which,—if I may venture to say so of a case in which I took part, —is a perfectly sound decision. There, one party said to the other "I will buy of you all *your wool*," and extrinsic evidence was held admissible for the purpose of showing what the parties were contracting about,—it being uncertain and ambiguous upon the face of the contract whether "your wool" meant the wool of the seller's own clip, or partly that and partly wool which he had acquired by purchase from other
*322] *persons. I think that was properly decided: and I am perfectly certain that it prevented the buyer, under the shelter of a supposed rule of law, from making falsehood successful, and relieving himself from his bargain.

Then the parol evidence being admitted, the contract appears to have

been a contract under which the defendant was to enter into the service of the plaintiffs as their traveller on the midland journey; and, in consideration of their so employing him, he agrees, that, in the event of his travelling,—that is, soliciting orders,—for any other house in the same trade, on any part of the same ground, he will pay the plaintiffs 50*l.* I think that is a valid contract within numerous cases, and not obnoxious to the objection that it is an undue and unreasonable restraint of trade.

For these reasons I am of opinion that the plaintiffs are entitled to the judgment of the court on all these points. And, with reference to another point which was shortly adverted to in the argument,—that this engagement on the defendant's part not to travel for any other house in the same trade, was applicable only to the time during which the defendant was retained as traveller for the plaintiffs,—I think the whole surrounding circumstances show that that was not the meaning of the parties. The plaintiffs contract for the entire services of the defendant as their traveller. The stipulation that he should not travel for another house in the same trade during his service with the plaintiffs would be altogether repugnant and inconsistent. Travellers on commission, who take orders for several different houses, are a well-known class of persons. But this is the case of a traveller hired exclusively to solicit orders for the plaintiffs. The rule to enter a nonsuit must therefore be discharged.

*BYLES, J.(*a*)—I also am of opinion that this rule must be discharged. The first objection is, that there was no consideration [*323 apparent on the face of the written agreement. But the facts are, that the defendant entered into the service of the plaintiffs as traveller late in March, or in the beginning of April, upon an understanding that there was to be a formal written contract between them, and a list of the places he was to go to and of the customers he was to call on, sent to him. Accordingly the list was sent, and the written contract, which the defendant executed and returned. The consideration is thus expressed, —"In consideration of my entering upon your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so." Looking at all the circumstances, it seems to me that there is no pretence for saying that there was not a solid consideration for the agreement, and that the consideration abundantly appears upon the face of the document.

Then it is said that there has been no breach; for that the contract contemplates the defendant's being precluded from travelling for any other house in the same trade only *whilst he should continue in the service of the plaintiffs;* and there was no evidence of his having done so. The words of this part of the contract are,—"with the understanding, that, in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*" It seems to me that the defendant would have been grossly deserting his duty, and indeed abjuring his employment in the service of the plaintiffs, if he had engaged to travel for another house in the same trade whilst his whole time and talents were stipulated to be devoted to the plaintiffs' service. The plain meaning of the agreement, *as I read it, is, that the defendant shall not travel for [*324 any other person in the same trade over any part of the same ground after he shall have left the plaintiffs' employ, upon pain of for-

(*a*) Williams, J., was engaged in the Divorce Court.

feiting 50*l*. The object of this is manifest. There is, therefore, no ground for saying that there was no breach of the agreement.

As to the evidence,—it strikes me not only that parol evidence was properly received here, but that, if it had been rejected, great difficulty would have arisen which has been prevented by the course taken by the learned judge. Upon the face of the written agreement, there is nothing to show either the nature of the *employment* or the meaning of the *same ground*. Parol evidence was absolutely necessary to apply the contract to some certain subject-matter. Indeed, this is just the case for parol or extrinsic evidence. The evidence, when admitted, showed that the contemplated "employment" was as traveller, and that the "ground" was that part of England which was familiarly known and understood by the parties by the description of "the midland journey." Evidence of this sort is admitted every day in construing wills. The moment it appeared here that the duty to be performed by the defendant was that of traveller, and that that duty was to be performed on the midland journey, the matter to which the contract related was identified and made manifest. There was another species of parol evidence also given in this case, viz. that the vacancy amongst the travellers in the plaintiffs' establishment occurred on the journey known as the "midland journey," and that that fact was communicated to the defendant while the contract was in the course of arrangement. That evidence could not be excluded. Precisely these two descriptions of evidence were given in Macdonald *v.* Longbottom, 28 Law J., Q. B. 293. I on
*325] that occasion entertained very great *doubt whether the communication of the fact was admissible, and nonsuited the plaintiffs: but the Court of Queen's Bench held distinctly that both species of evidence were admissible; and Erle, J., said,—"If the plaintiffs had informed the defendants that they had the wool partly from their own farm and partly from their neighbour's, it would not vary the contract, nor would it add to it; it is not only the meaning of the plaintiffs, but also of the defendants. The statement is admissible as having been communicated to the defendants, but not as having been embodied in the contract." That case is a distinct authority to show that the course adopted on this occasion was perfectly correct.

The next question is, whether upon the agreement alone, without the light thrown upon it by the parol evidence, this would not have been a void contract, as being an unreasonable restraint of trade. On the face of the agreement, I think that would have been a very doubtful question. In a case in this court, a prohibition extending to a radius of one hundred miles from York was held to be unreasonable.(*a*) As the law stands, therefore, but for the parol evidence, a serious question might have arisen whether the restraint here, being limited in point of space, was not so unreasonable as to render the contract void. It is a popular, but in my judgment a mistaken, notion that parties ought to
*326] be at liberty to enter into contracts after their *own fashion. The legislature has not thought this expedient; for, it has in

(*a*) See Horner *v.* Graves, 7 Bingh. 735 (E. C. L. R. vol. 20), 5 M. & P. 768. In delivering the judgment of the court in that case, Tindal, C. J., says: "Whatever restraint is larger than the necessary protection of the party can be of no benefit to either: it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy."

numerous instances interfered in the way of limitation or prohibition,—as, for instance, in the disposition of property by will. There are many cases in which it is expedient for the law to interpose for the protection of the ignorant or of those who would otherwise be subjected to undue influence or pressure. But, when the evidence is looked at here, it becomes manifest that the restraint it imposed, which at first appeared to be unlimited as to space as well as time, was in truth limited to a particular district. So explained, it seems to me that the restraint imposed is not unreasonable or injurious to the public, but that it was necessary and proper for the fair protection of the plaintiffs' trade.

CROWDER, J.—I am of the same opinion. The rule was to enter a nonsuit upon several grounds reserved at the trial (which are inserted in the rule), and also for a new trial upon the further ground that parol evidence was improperly admitted. I thought at the time, and I still think, that the points taken were not supported. The case has been fully argued, and I entirely agree with my Lord and my Brother Byles that the rule is answered upon all points.

The first ground urged was, that there was no consideration for the defendant's promise. I thought, and still think, that the language of the agreement necessarily imported consideration; and the circumstances under which the agreement was entered into show that there was substantially no agreement entered into until the written contract was drawn up and signed. It had been previously proposed that the defendant should enter into the employ of the plaintiffs as a traveller on the midland journey upon certain terms to be afterwards reduced into writing. But, before that *had been done, the defendant had started on [*327
the journey; and, the agreement being sent down to him to sign, he signed and returned it, and so the agreement became complete. It is said that because three or four weeks had intervened between the time of the defendant's starting on his journey and the signature of the agreement, there was a want of consideration. But, if that argument be worth anything, it might equally have been urged if the agreement had been sent down to the defendant by the next post. Until the written document was signed, the agreement was inchoate, or, rather, it was a proposal only, not perfected until the agreement was signed.

The next point made, was, that, assuming there was an agreement upon sufficient consideration, there was no breach, for that the prohibition against the defendant's travelling for any other house in the same trade was intended to apply only during the time of his remaining in the employ of the plaintiffs. It appeared to me at the trial that there was nothing at all in that point; and I retain that opinion now. It appeared that the defendant was engaged as one of six travellers for the plaintiffs, to each of whom a certain district was assigned. It was obviously the intention of the parties to preclude the defendant from the opportunity, when he should have left the plaintiffs' service, of giving another employer in the same trade the benefit of the knowledge of their customers in the locality which he should have acquired while in their service. It clearly was intended to apply not during the service, but after its discontinuance.

Then it is said that the plea was proved. To establish that proposition, the defendant must show that the parol evidence received at the trial was improperly admitted; because, if that evidence was rightly

*328] admitted, there can be no pretence for saying that the *agreement was bad as an unreasonable and undue restraint of trade. The note which I made at the time of the object and purpose for which the evidence in question was admitted, was this,—"I admit this evidence to show to what the agreement referred." It seemed to me that the language of the agreement was so vague and wide that it was impossible to understand to what it applied, without letting in evidence to show in what capacity the defendant was to be employed, and to identify the ground over which he was to travel.

Assuming the parol evidence to have been properly received, the consideration for the agreement was sufficient, and the restriction imposed upon the defendant thereby not an unreasonable one. I agree with my Lord, and also with the suggestion thrown out by Parke, B., in Mallan *v.* May, 11 M. & W. 665,† that, so far from being injurious to the public, it is greatly to the benefit of trade that these restricted contracts should be entered into. I think there is no pretence for saying that the third plea was proved. When looked at, it seems to me to be impossible to say that on the agreement alone could the plea be proved. The plea is, that, at the time of making the agreement, the defendant was a traveller in the trade of a lace and sewed-muslin merchant, and had no other means of earning his living, and that he was employed by the plaintiffs as their traveller in the said trade, *to travel all over the kingdom;* and that the said agreement was an unreasonable and general restraint of the defendant's trade, and entirely prohibited and restrained the defendant from exercising the said trade after the defendant ceased to be employed by the plaintiffs, and that the plaintiffs were not by the said agreement bound, nor did they agree to employ the defendant during his life; and that they had ceased to *329] *employ the defendant before he travelled for the said other person as in the declaration mentioned. There is nothing *in the agreement* to warrant the allegation in the plea that the defendant was employed "to travel all over England" for the plaintiffs. The parol evidence shows that the engagement was limited to travelling over the midland district. The objection, therefore, that the agreement was an unreasonable restraint of trade cannot arise. The plea is consequently disproved, whether the written agreement only is looked at, or we have recourse to the parol evidence. For these reasons it appears to me that the evidence was properly admitted, and that the rule must be discharged. Rule discharged.

HOLMES *v.* BELLINGHAM. *June* 24.

The presumption that the soil of a road usque ad medium filum viæ belongs to the owners of the adjoining lands, applies equally to a private as to a public road.

THE declaration stated that the defendant, on divers days, entered a yard, the property of the plaintiff, at Melton Mowbray, in the county of Leicester, and broke open gates in the said yard, and broke and damaged a lock, the property of the plaintiff. Claim, 10*l.*

Pleas,—first, not guilty,—secondly, a traverse of the possession of

the plaintiff,—thirdly, that the yard was the property of one Joseph Firbank, and that the defendant was acting as his servant and by his command,—fourthly, user of the yard by the defendant for twenty years as a way to his premises, that the *plaintiff obstructed his right of way by locking the gate, and that he broke it open, doing no unnecessary damage,—fifthly, user for forty years by the defendant and the occupiers of his dwelling-house, for horses, cattle, carts, and carriages, and that because the plaintiff erected the gates aforesaid, therefore the defendant committed the trespasses alleged,—sixthly, setting out the title of Joseph Firbank, and a demise by him to the defendant,—seventhly, a right of way for all the liege subjects of the Queen, with horses, carriages, and carts, and on foot, at all times of the year, and as such liege subject the defendant entered, and broke, &c. Issue thereon. [*330

The cause was tried before Erle, J., at the Leicester Spring Assizes, 1859, when the facts which appeared in evidence were in substance as follows:—The plaintiff was the occupier of a house and premises at Melton Mowbray, as tenant to one Firmin, between which and certain other premises occupied by the defendant as tenant to one Joseph Firbank (formerly Mrs. Raven's) was a road or lane leading from the public street to a brewhouse and garden part of the plaintiff's premises. Down to the year 1828 this lane was open to the street; but in that year gates were put up by the then owner of the plaintiff's premises, *with the consent of Lord Harborough, the owner of the adjoining premises*, the key being kept by the former, and lent to the tenant of the latter when he wanted to unload hay and straw into a loft, the door of which (about ten feet from the ground) formed the only opening from that side into the lane.

On the part of the plaintiff it was proved that he and the former occupiers of his premises had always kept the lane in repair, and had also repaired and renewed the gates when necessary, and that they had used the part of the lane adjoining the brewhouse as a *place for keeping and drying their brewing utensils; that there never had been any entrance into the lane from the defendant's premises, except the loft-door before mentioned, until the year 1859, when the defendant opened a passage into it a little lower down than the loft; and that neither the defendant nor any other occupier of his premises had ever exercised or claimed to exercise any right of way along the lane except for the purpose of taking hay and straw to the loft as before mentioned, which right was conceded. [*331

The conveyance from Norman, the former owner of the plaintiff's premises, to Firmin, and which professed to convey the premises as delineated in a plan in the margin which included the lane in question, was tendered and (after objection) admitted to show the title, though, as the learned judge observed, it proved nothing without showing acts of ownership.

The trespass complained of was committed in assertion of a right by the defendant to use the newly-opened passage from his premises into the lane.

The defendant, having failed to establish a right of way to the extent necessary to justify the trespass, rested his defence upon the third plea,

insisting that the soil of the lane usque ad medium filum viæ was in Firbank, his landlord.

The way in which the question was presented to the jury was reported by the learned judge as follows:—

"As to the plea of public way, I presume there is no question; and, as to the plea justifying under a private right of way from Mrs. Raven's premises into the lane, I held, that, as Mrs. Raven's premises had no communication with the lane, the user of those claiming under Lord Harborough in respect of the Black Swan and other premises, was no evidence of a right for Mrs. Raven's premises.

*332] "With respect to the plea of not possessed, it was *argued by the counsel on both sides that the plaintiff claimed the entirety of the lane; and, if he was not entitled to the entirety, the issue should be found for the defendant.

"I then left the question whether the soil ad medium filum viæ did not belong to the proprietors on each side, drawing attention to the evidence of permission for putting up the gates, and to the evidence indicating an occupation way to the respective premises abutting on the lane, and to the presumption that the soil, subject to the way, was in the owners of the adjoining land.

"The jury retired, and after a time asked whether the first issue relating to property was connected with right of way, or exclusively a right to the soil.

"I told them the question related solely to property in the soil,—is the whole in Mr. Norman, or half in him and half in the owner of the adjoining property? The jury found on this issue for the defendant."

A verdict having accordingly been entered for the defendant on the second and third issues,

Hayes, Serjt., in Easter Term last, obtained a rule nisi to set aside that verdict, and for a new trial, on the grounds,—first, that the learned judge misdirected the jury in applying to the present case the presumption that the ownership of the soil belonged to the plaintiff's and defendant's landlords in equal moieties, and leaving the question to the jury on that footing,—secondly, that the verdict was against evidence. He submitted that the presumption of ownership in equal moieties, in the absence of evidence to the contrary, though reasonable in the case of public roads or rivers, could not with equal propriety be applied to private ways, the circumstances of their creation and user being so infi-

*333] nitely various. [COCKBURN, C. J.—In the *case of a private way, in the absence of evidence to show that it is the soil of either party, the presumption ought to be that each of the adjoining owners is entitled usque ad medium filum viæ. But, if the evidence shows that one only has exercised dominion over it, if it be not matter of arrangement, the natural presumption would be that the right was in him, and that the other had merely an easement.] The evidence here showed that the only person who had ever exercised any act of ownership over this lane was the plaintiff's landlord. It is true that the gates were put up with the consent of Lord Harborough: but the putting up of gates was necessarily matter of arrangement, seeing that the easement had before been unobstructed.

Mellor, Q. C., and *Beasley* showed cause.—There was no misdirection. The rule of law as to the presumption of the soil of a public way

belonging in equal moieties to the owners of the land on either side, is equally applicable to the case of a private way. It is a rule introduced for convenience, that there may not be perpetual disputes about trifles: it is akin to the rule as to boundary or party walls, that the user in common affords primâ facie evidence that the wall and the land upon which it stands belong in common to the owners of the adjoining premises: Cubitt *v.* Porter, 8 B. & C. 257 (E. C. L. R. vol. 15), 2 M. & R. 267 (E. C. L. R. vol. 17). The same rule is said by Lord Mansfield, in Carter *v.* Murcot, 4 Burr. 2162, to apply to rivers. "The rule," he says, "is uniform. In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends ad filum medium aquæ." There can be no good reason why the rule should not be applied to the case of a private way. Assuming the presumption of equal ownership to apply to a private *way, there was nothing in the evidence here to rebut that presumption. The [*334 acts of ownership were as consistent with the one view as with the other; and the fact of the gates having been put up with the permission of the owner of the defendant's premises, well warranted the jury in coming to the conclusion they did.

Hayes, Serjt., and *W. G. Harrison*, in support of the rule.—There is no pretence for saying that the presumption of joint ownership arises in the case of a private as it does in that of a public road. The learned judge, therefore, ought to have left the case to the jury simply upon the acts of ownership. The reason for the presumption in the case of a public road is explained in the judgment in Doe d. Pring *v.* Pearsey, 7 B. & C. 304 (E. C. L. R. vol. 14), 9 D. & R. 908 (E. C. L. R. vol. 22). Bayley, J., there says: "It is a primâ facie presumption that waste land on the sides, and the soil to the middle of a highway, belong to the owner of the adjoining freehold land. The rule is founded on a supposition that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his enclosure and the middle of the road." And Littledale, J., says: "We do not know the origin of these rights. In all probability the rule that the presumption is to be in favour of the owner of the adjoining land has arisen from its being a matter of convenience to the owners of adjoining land, and to prevent disputes as to the precise boundaries of property." There may be very good reasons for applying this rule of presumption to the case of public roads: but those reasons are wholly inapplicable to private roads, the circumstances attending the formation of which are so infinitely various. Cubitt *v.* Porter is rather an authority to show that the rule is *not applicable to a private way. [*335 All notion of presumption is at all events rebutted by the evidence of repeated acts of ownership by the plaintiff and those whom he represented. The gates were put up more than thirty years ago. [COCKBURN, C. J.—By permission of Lord Harborough.] It was conceded that Lord Harborough and his tenants had a right to use the way for the purpose of having access to the loft. But it was proved that the gates and the road itself had always been repaired by the plaintiff's landlord. The rule upon the subject of party-fences is thus stated in Selwyn's Nisi Prius, 12th edit. 1297,—"Where two adjacent fields are separated by a hedge and ditch, the hedge primâ facie belongs to the owner of the field in which the ditch is not. If there are two ditches,

one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. The common user of a wall separating adjoining lands belonging to different owners, is primâ facie evidence that the wall and the land on which it stands belong to the owners of the adjoining lands in equal moieties as tenants in common. The rule about ditching is this: a person making a ditch cannot cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land: he is of course bound to throw the soil which he digs out upon his own land, and often, if he likes, he plants a hedge on the top of it." A joint user of a way will not make the parties tenants in common, any more than adjoining owners by the joint use of a party-wall become tenants in common of the wall: Matts v. Hawkins, 5 Taunt. 20 (E. C. L. R. vol. 1). "Under the circumstances," says Sir J. Mansfield, in that case, "each has a right to the use of this wall; but the wall stands part on the ground of each, and therefore is not the property of them as tenants in common; and each party for any injury
*336] done to the part which stands on his own land, *must have the ordinary remedy." [WILLIAMS, J.—Suppose there was a road passing between two fields, one belonging to A., the other to B., and leading to land belonging to C., with evidence of user only by C.,—in whom would be the ownership of the soil of the road?] In C., no doubt. The user of it by him would be some evidence of ownership; and there would be nothing whereon to found a presumption in favour either of A. or B.

COCKBURN, C. J.—I have considered this case very attentively, and the conclusion I have come to is, that the rule should be discharged. I think, upon the whole, there is no ground for saying that there was any misdirection. The direction complained of is, that the learned judge told the jury that there was a presumption, in the case of a private way or occupation road between two properties, that the soil of the road belongs usque ad medium filum viæ to the owners of the adjoining property on either side. That proposition, subject to the qualification which I shall presently mention, and which I take it was necessarily involved in what afterwards fell from the learned judge, is in my opinion a correct one. The same principle which applies in the case of a public road, and which is the foundation of the doctrine, seems to me to apply with equal force to the case of a private road. That presumption is allowed to prevail upon grounds of public convenience, and to prevent disputes as to the precise boundaries of property; and it is based upon this supposition,—which may be more or less founded in fact, but which at all events has been adopted,—that, when the road was originally formed, the proprietors on either side each contributed a portion of his land for the purpose. I think that is an equally con-
*337] venient and reasonable principle whether *applied to a public or to a private road: but, in the latter case, it must of course be taken with this qualification, that the user of it has been quâ road and not in the exercise of a claim of ownership. If the learned judge had told the jury that the presumption was to prevail against evidence of acts of ownership, I should have said that his direction was not correct. But I do not understand that he so put it to them. He merely stated that the same presumption which arises in the case of a public way arose also in the case of a private way. But he went through the evidence

as to the acts of ownership upon which the plaintiff relied as rebutting the presumption. I therefore think there is no ground for saying that there has been any substantial misdirection. This brings us to the second question, viz., whether the verdict was against evidence. Now, there was strong evidence on both sides; and the learned judge reports to us that he was not dissatisfied with the verdict. That being so, I think we should be departing from the rule upon which we are in the habit of acting in these cases, if, not seeing clearly that there has been a failure of justice, we were to disturb the conclusion to which the jury have come.

WILLIAMS, J.—I also am of opinion that this rule should be discharged. The learned judge reports to us that he told the jury that the presumption which arises in the case of a public road applies also to the case of a private road running between two adjoining properties, viz. that the soil of it usque ad medium filum viæ belongs to the owner on either side; but that he did not leave the question to them simply and exclusively in that way, but pointed their attention to the history of the premises, and to the evidence of acts of user on the one side and on the other. Now, as to the proposition that the presumption which is *established in the case of a public road, prevails also in the case of a private road, I think that is not inaccurate, provided [*338 the proposition is confined to the simple case of a private road bare of all other circumstances. If nothing else appears than the existence of a private way running between the lands of two adjoining proprietors, I do not quarrel with the proposition; for, there being nothing else to guide them to a conclusion, I think the jury may very well presume that the soil of the road belongs half to the one and half to the other. That, like all other presumptions, may be rebutted by evidence of acts of ownership: and I do not understand the learned judge to have left it in that naked way; but he seems to have called the attention of the jury to all the evidence in the case. I feel, however, bound to say, that, in my judgment, the learned judge did not adopt the strictly accurate course. He ought, I think, to have told the jury, that, if nothing more appeared than the fact of the existence of the way and its user by the tenants of both properties, they might reasonably presume that the property in the soil was in each of the adjoining owners usque ad medium filum viæ; but that they must look at all the other evidence in the case, showing the exercise of acts of ownership on the one side, and the user of the road as an occupation way on the other, which must be presumed to have been done rightfully by reason of their having been owners usque ad medium filum viæ, or joint owners or tenants in common of the road. This last proposition was not put to the jury: but the defendant is the only person who could complain of that, the plaintiff claiming the exclusive right to the whole road. As to that part of the rule which asks for a new trial on the ground that the verdict was against evidence, the learned judge having reported to us that he is not dissatisfied, and as *I do not see that the jury necessarily came [*339 to a wrong conclusion, I see no ground for disturbing the verdict

CROWDER, J.—I also am of opinion that there was no misdirection in this case of which the plaintiff could complain, nor any ground for setting aside the verdict as being against evidence. As to the alleged misdirection, as I understand it, the learned judge stated it to the jury

as a simple proposition of law, that the rule as to the soil being presumptively vested in the respective owners of the adjoining lands usque ad medium filum viæ, was the same in the case of a private road as in that of a public road,—independently of circumstances, such as the exercise of acts of ownership, by which that inference or presumption might be rebutted. If the learned judge had left the case to the jury simply upon the presumption of law, apart from the evidence of acts of ownership, I think that would have been an inaccurate direction. But I do not understand him to have done that. I understand him substantially to have said, that, assuming that there was no evidence of acts of ownership on the one side or on the other, there was no difference as to the presumption of ownership, between a public and a private way. There clearly was no misdirection in that. As to the other part of the rule, although undoubtedly a good many acts of ownership were proved on the part of the plaintiff, I am not disposed to quarrel with the verdict.

WILLES, J., said nothing. Rule discharged.

Hayes, Serjt., on behalf of the plaintiff, asked leave to appeal.

340] COCKBURN, C. J.—None of us entertain any doubt; and the value of the property is too small to make it worth while.

Hayes, Serjt.—Though the value be small, the question involved is of considerable importance.

PER CURIAM.—We do not think this is a case in which we ought to do anything to facilitate an appeal. Leave to appeal refused.

WILLIS and Others *v.* PALMER and Others. *June* 28.

The owners of a ship gave a power of attorney authorizing their agent to do many acts for them, and, among others, "to sign any bottomry-bond or instrument of hypothecation on the vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage or otherwise as he should think proper, the said vessel, or any share thereof, and to execute all instruments, and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owner, if present, could have done."

Under this power, the agent, by deed,—reciting a mortgage of the ship, and the necessity for further advance to enable the ship to set sail, and the advance of 4000*l.* for that purpose by the plaintiffs, assigned all the freight, hire, and passage-money, and earnings of the said ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4000*l.* should be repaid. The ship sailed, and arrived at Liverpool; but the 4000*l.* was not paid.

After the ship had sailed, the agent of the owners received the passage-money of certain passengers by bills on England payable at sight, which bills were remitted to the owners in England, and the amounts received by them before the arrival of the ship:—Held, that the power of attorney authorised the assignment of the passage-money, and gave the mortgagees an immediate right to it before they took possession of the ship; and consequently that they were entitled to recover back the amount so received.

THIS was an action for money received by the defendants for the plaintiffs' use, for interest, and for money due on accounts stated, with a count in trover for bills of exchange.

The defendants pleaded to the count in trover, not guilty, and not the property of the plaintiffs; and, to the residue of the declaration, never indebted.

*The facts were by consent of the parties, and by a judge's order, stated for the opinion of the court. [*341

The plaintiffs constitute the firm of Willis, Merry & Co., merchants at Melbourne.

In 1853, Mr. Edmund Thompson was the sole registered owner of a screw steamer called the Antelope, belonging to the port of Liverpool. Though the vessel was registered solely in his name, she was purchased and sailed on account of the firm of Millers & Thompson, merchants at Liverpool, of which firm Mr. Edmund Thompson was a member. The plaintiffs were correspondents of the firm of Millers & Thompson.

In March, 1853, the vessel was sent out to Melbourne with a supercargo of the name of Crawford Maine on board. Mr. Edmund Thompson on the 5th March, 1853, executed a power of attorney to Mr. Crawford Maine and the plaintiffs, of which the following is a copy:—

"Know all men by these presents, that I, Edmund Thompson, of Liverpool, in the county of Lancaster, in the united kingdom of Great Britain and Ireland, merchant and ship-broker, send greeting: Whereas, I am the sole registered owner of the screw steamer called the Antelope, of Liverpool, now about to proceed on a voyage to Australia, and I have determined to appoint Crawford Maine, of Liverpool aforesaid, merchant, who is about to proceed in the same vessel as supercargo thereof, and Joseph Scaife Willis, of Sydney, merchant, William Lucas Merry, of Melbourne, merchant, and David Smith, presently of Liverpool, merchant, but about to proceed to Australia, my attorneys for the purposes hereinafter expressed, to act for me in all matters relating to the said vessel: Now, therefore, these presents witness, that I, the said Edmund Thompson, do hereby nominate, constitute, and appoint the said Crawford Maine, Joseph Scaife Willis, William *Lucas Merry, and [*342
David Smith, jointly, and each of them separately, to be my true and lawful attorneys and attorney, for me and in my name, or in their or his own names or name, or otherwise as may be expedient, to act in and conduct and manage all and every the affairs, transactions, matters, and things of or relating to the said vessel, or the freight and earnings, or the employment, charter, or hire thereof; and, for that purpose, I do by these presents authorize and empower them my said attorneys, and each of them, in my name, and on my part and behalf, or in their or his own names or name, or otherwise as to them or him may seem expedient, to sail, navigate, and employ, or negotiate for the charter, freight, or hire, and employment of the said vessel for such spaces of time, for such voyages, and on such terms as they or he may think advisable, and for that purpose to make, sign, and execute all such charter-parties, bills of lading, and other documents, as may be by them or him deemed proper; And also for me and in my name, and for my use, to demand and receive, and, if necessary, to sue for and recover by all lawful ways and means, of and from the charterers of the said vessel and all other persons whom it shall or may concern, all and every sum and sums of money which shall or may at any time or times hereafter be or become due, owing, and payable by and from them, any or either of them, as freight or otherwise for or in respect of any goods or merchandise shipped on board of the said vessel by virtue of any charter-party or engagement now or hereafter to be entered into, and, upon receipt of all or any such sums and sum of money, to give sufficient

receipts and discharges for the same: and also for me and in my name to sign and give any bottomry-bond or instrument of hypothecation on the said vessel or her cargo; and also for me and in my name to sell
*343] *and dispose of, either absolutely or by way of mortgage, or otherwise as they or he shall think proper, the said vessel, or any share or shares thereof, with the appurtenances, and, for these purposes, for me and in my name or otherwise to make, sign, seal, execute, deliver, and perfect all and every such contracts, agreements, assurances, transfers, assignments, or other instruments of sale as may be effectual for conveying and assigning the said vessel, and every or any share or shares thereof, with the appurtenances, to the respective purchasers or mortgagees thereof, and to do all other acts, deeds, matters, and things which shall be requisite and necessary for completing such sales, transfers, and mortgages, or any of them; and also for me and in my name, or otherwise, from time to time to purchase as cargo for the said vessel any goods or merchandise, and to make any consignments or dispositions thereof, or any part thereof, and to transact all other affairs and business relating thereto as to my said attorneys or any or either of them may seem expedient; and also for me and in my name, or in their or his own names or name, to draw, accept, or endorse any bills of exchange or promissory notes in payment and satisfaction of the said cargo or cargoes, or any part thereof, or on account of any debt or claim due or payable to or from me in respect of the said vessel; and also for me and in my name to remove the present or any future master of the said vessel, or any engineer, officer, or seaman, or other person on board the same, and from time to time to appoint any other master, engineer, or officer thereto, or to engage any other seamen or other persons for service on board the said vessel, upon such terms and conditions as they or he shall think proper; and also to compound with any person or persons for or in respect of any debts or sums of money, claims or de-
*344] mands whatsoever which now are, or which shall at *any time hereafter be or become due or payable to me in respect of the said vessel, or the freight or earnings thereof, or in anywise relating thereto, and to take or receive any composition or dividend thereof or thereupon, and give receipts, releases, or other discharges for the whole of the same debts, sums, or demands, or to submit to arbitration all and every or any such debts or demands, and all and every other claims, rights, disputes, and things due to or concerning me, as my said attorneys or attorney shall think most advisable for my benefit and advantage, and for that purpose, in my name, or in their or his own names or name, as they or he may think proper, to enter into, make, sign, execute, and deliver such bonds, agreements, and submissions to reference as may be necessary; and also for me to appear and my person to represent in all courts and before all magistrates or officers in law or equity whatsoever as by them or him shall be thought advisable, or as they or he shall think fit, and to sue, arrest, disclaim upon, imprison, and out of prison again to liberate, release, acquit, and discharge all and every or any person or persons whomsoever now indebted or who shall or may at any time hereafter become indebted to me, or upon whom I now have or hereafter shall or may have any lawful claim or demand; and also for me and in my name or otherwise to commence any action, attachment, suit, or other proceedings, in any court of law or equity for the recovery

of any debt, sum of money, certificate of registry, or other document, right, title, interest, property, matter, or thing whatsoever now or hereafter to become due, payable, or deliverable, or in anywise belonging to me by means or on account of the said vessel and premises, or otherwise howsoever, and the same at pleasure to revoke and discontinue or become nonsuit, and another or others again to commence and *prosecute; and also for me and in my name to use and take all such other lawful ways and means for the recovering, receiving, [*345 obtaining, or getting in any such sums of money or other things whatsoever which is, are, or shall be, or which shall by my said attorneys and attorney be conceived or thought to be, due, owing, belonging, deliverable, or payable unto me in respect of the said vessel, or otherwise howsoever, by any person or persons whomsoever, as to my said attorneys or attorney shall seem proper or expedient; and also, if they or he shall think advisable, to appear to and defend all actions, suits, or other proceedings which may be brought against the said vessel, or against myself in respect thereof or otherwise; and also to appoint any attorney or solicitor, and to give and sign any warrant to prosecute and defend in the premises aforesaid, or any of them, as occasion shall require; and generally to do all and every or any other acts, deeds, matters, and things whatsoever in and about my said business and affairs, as amply and effectually to all intents and purposes as I could do if personally present, I binding myself to ratify and confirm and allow whatsoever shall be lawfully done by virtue hereof: And I do further give to my said attorneys and each of them and every of them full power one or more attorney or attorneys under them or him from time to time to substitute and appoint for all or any of the purposes aforesaid (with or without power for such substitute or substitutes one or more attorneys under him or them again to appoint), and such appointment at pleasure to revoke, and another or others again to appoint. In witness, &c."

On the 5th of August, 1854, at Sydney, in New South Wales, Mr. Crawford Maine executed in the name of Edmund Thompson a deed of mortgage of the Antelope. By this deed, which purported to be made *between Edmund Thompson, of Liverpool, sole and duly regis- [*346 tered owner of the steam-ship "Antelope," of the one part, and the plaintiffs, merchants of Sydney, in New South Wales, and copartners, of the other part,—reciting such ownership and the certificate of registry, and that the plaintiffs had at the request of the said Edmund Thompson paid and advanced and become liable for divers sums of money for him, and for disbursements and expenses of the said ship, amounting to 10,500*l.*, upon condition that the repayment thereof and of future advances and liabilities should be secured by his covenant, and by the assignment of the said ship, her freight, passage-money, earnings, and policies of insurance, the said Edmund Thompson, in consideration of the said sum of 10,500*l.* then due from him to them, granted, bargained, sold, assigned, transferred, and set over to them the said steamship, with all masts, &c., and all freights, passage-money, earnings, gains, &c., for or on account of the said ship, to have, hold, receive, take, and enjoy the same for their own use and benefit, and as their own proper goods, chattels, moneys, and securities, thenceforth for ever,—subject to a proviso for reconveyance on payment by him to them on the 5th of February, 1855, of the said sum of 10,500*l.* and all other

sums lent, paid, or become liable for, with interest. The deed also contains covenants by him with them for payment of the said sums and interest, a power of attorney to proceed in his name for recovery of moneys, a power of sale in case of default in payment, a declaration that their receipts should effectually discharge, and the usual covenants for title. This deed was duly registered at Liverpool on the 17th of November, 1854; and all things necessary according to the acts in force concerning merchant shipping, for rendering the same effectual for the purposes therein mentioned, have been duly done.

*347] *The vessel was put up as a general ship for goods and passengers on a voyage to Liverpool. The plaintiffs made further advances for the purposes of this voyage; and, with a view to give them security for those advances, Alexander Price French, who was the master of the ship, appointed at Rio de Janeiro by Mr. Crawford Maine on the outward passage to Melbourne, and the said Mr. Crawford Maine, the supercargo, as attorney for Edmund Thompson, on the 30th of November, 1854, executed a deed of that date, a copy of which accompanied the case, and was to be referred to by either party as part of it.

This deed purported to be executed by Crawford Maine as attorney for Edmund Thompson, in the name of Edmund Thompson: it purported to be made between Alexander Price French, master of the said ship, then at Port Jackson, in New South Wales, as such master, and the said Edmund Thompson, as owner of the said ship, of the one part, and the plaintiffs of the other part, reciting that the said ship was bound for a voyage to Liverpool, and that, with a view to such voyage, it had become absolutely necessary that she should be extensively repaired, and that a considerable sum of money should be laid out in so repairing her, and in making her in all respects fit and safe for such voyage, and that the said Alexander Price French and Edmund Thompson had found it absolutely necessary to raise the sum thereinafter mentioned, in manner and on the terms therein set forth, for the purpose of effecting such repairs and providing for the other necessary disbursements and expenses, so as to enable the said ship to proceed to sea on her said intended voyage; and that the plaintiffs had been requested and had agreed to lend and advance to them the sum of 4000*l.* for the aforesaid purposes, upon their entering into and executing the same deed for the purpose of collaterally

*348] *securing the repayment of the said sum of 4000*l.* with interest, —the said Alexander Price French, as such master, and the said Edmund Thompson, in consideration of 4000*l.* to them then paid by the plaintiffs, bargained, sold, assigned, transferred, and set over to plaintiffs *all and singular the freight, hire, passage-money, and earnings of the said ship on her said intended voyage to Liverpool, and all sum and sums of money to be recovered and received by virtue or in respect of the same, and the several bills of lading of the goods, wares, and merchandise shipped or to be shipped on board of the said ship, in respect of which the said freight, hire, and earnings were or should be payable,* and all benefit and advantage thereof, and all the right and title of the said Alexander Price French and Edmund Thompson, and each of them, by way of lien or otherwise under, in, to, or out of the said goods, and all powers and authorities in respect therof, and all the right, title, interest, benefit, claim, and demand whatsoever, at law and in equity, of them the said Alexander Price French and Edmund Thompson, of, in, to, or

of, or upon the said freight, hire, passage-money, earnings, sum and sums of money, and premises thereby assigned; To have, hold, receive, take, and enjoy the same to the plaintiffs absolutely, as and for their own absolute estate, property, moneys, and effects.

The deed also contained powers of attorney to the plaintiffs to recover and receive the said freight, hire, passage-money, earnings, moneys, and premises; to take possession of, and, if necessary, to sell the goods, and to receive the proceeds; to bring actions and suits, and to give effectual receipts; also a covenant by the said Alexander Price French and Edmund Thompson with the plaintiffs to pay them the said sum of 4000*l.*, with interest at 8 per cent. per annum from the *date of the said deed up to the time of payment, at or before the expiration of ten days after the safe arrival of the said ship at Liverpool; also a declaration that the plaintiffs should stand possessed of all moneys and premises coming to their hands by virtue of that deed, in trust, first, to pay and retain all expenses, next to pay and retain to themselves the said sum of 4000*l.* with the said interest at the rate aforesaid up to the day of payment, and lastly to pay and deliver the surplus, if any, to the said Alexander Price French and Edmund Thompson, or as they should direct; also a proviso, that, on payment to the plaintiffs of the said sum of 4000*l.* with interest as aforesaid, at or before the expiration of ten days after the safe arrival of the said ship at the port of Liverpool, that deed should be cancelled and made void. [*349

The ship continued put up for the voyage to Liverpool after the execution of those deeds. The greater part of the freight and passage-money was made payable after the arrival of the ship in Liverpool; and, as to that portion of the freight and passage-money, no question arises in this case; but three passengers paid for their respective passages by bills of exchange drawn by them on parties in England, which give rise to the question for the court.

These bills were one dated the 13th of December, 1854, for 20*l.*, payable in England, at sight, to the order of Crawford Maine, one dated the 14th of December, 1854, for 44*l.* 2*s.*, payable in England, at sight, to the order of Crawford Maine, and one dated the 7th of December, 1854, for 42*l.*, payable in England, three days after sight, to the order of Crawford Maine. These bills were delivered by the parties to Mr. Crawford Maine, who endorsed them to Millers & Thompson, and on the 5th of January, 1855, remitted them by post to Millers & Thompson at Liverpool, though, *owing to the circumstances after mentioned, the letter was not received by that firm. [*350

It is to be taken, for the purposes of this case (but not for any other purpose), that the sums of 10,500*l.* and 4000*l.* mentioned in the two deeds before mentioned were disbursed by the plaintiffs for the ship's purposes in Australia.

The Antelope sailed for Liverpool on the 2d of December, 1854, and arrived at Liverpool on the 16th of April, 1855.

While the ship was on her voyage to Liverpool, that is to say, on the 9th of February, 1855, by deed of that date, made between George Spurstow Miller, the said Edmund Thompson, and William Charles Miller, merchants and copartners, of the first part, the defendants of the second part, and the several persons whose names and seals were subscribed and affixed in the schedule thereunder written, being respec-

tively creditors of the said George Spurstow Miller, Edmund Thompson, and William Charles Miller, or one of them, of the third part,—reciting that the said parties of the first part, by reason of great losses in business, had been compelled to suspend their payments, they the said parties of the first part, and each of them, granted, conveyed, assigned, and transferred unto the defendants, all and singular the lands, tenements, messuages, hereditaments, goods, wares, merchandise, stock-in-trade, ships and vessels, and parts of ships and vessels, debts, contracts, sum and sums of money, or damages and compensation due thereon, bonds, bills, and securities for money, and all other the joint and separate real and personal estate and effects whatsoever and wheresoever belonging, due, or owing to them the said parties of the first part, or either of them, in anywise, and all deeds, evidences, books of account, accounts, vouchers, letters, writings, and documents relating to *351] *the said estate, and every part thereof, and all the estate, right, title, interest, property, claim, and demand, both at law and in equity, of them the said parties of the first part, and of each of them, in, to, or out of the same respectively, to have, hold, receive, and take the same unto the defendants upon the trusts thereinafter declared.

This deed contained powers of attorney to the defendants to ask, demand, sue for, recover, and receive of and from all and every person or persons indebted or liable, the goods, merchandise, debts, contracts, damages or compensations, sum and sums of money, and effects then due and owing or receivable and belonging to them the said parties of the first part, or either of them, and to give effectual receipts and discharges. The trusts of the deed were therein declared to be, the converting into money all and singular the joint and separate goods and chattels, stock, property, estate, and effects, real and personal, of the said parties of the first part intended to be thereby conveyed, and of each of them, and the application of the proceeds in the payment of all expenses, and, after payment thereof, the division of the said joint and separate estates unto and among the joint and separate creditors of the said parties of the first part, by an equal pound rate according to their several rights upon the said respective estates, in like manner as in bankruptcy. The plaintiffs executed this deed,—a copy whereof was to be referred to by either party upon the argument.

Upon the arrival of the Antelope at the port of Liverpool, the plaintiffs took possession of her and received the freight and passage-money (other than the passage-money which is the subject of this action) in respect of the said voyage, and sold the ship, with all her stores, &c., and received the price thereof. The *said sum of 4000*l.* was *352] not, nor was any part thereof, paid or tendered to them within ten days after the safe arrival of the ship at the port of Liverpool; and they have not been paid or satisfied the money intended to be secured by the said deeds of the 5th of August and 30th of November, 1854, except as to the sums received by them as aforesaid for freight, passage-money, and sale of the ship and stores, &c. After giving all due credits, there remains due to the plaintiffs in respect of the moneys secured by the first of these deeds, a sum far exceeding the claim in this action; and also, in respect of the moneys secured by the second of these deeds, a sum far exceeding the claim in this action.

The letter enclosing the bills of exchange before-mentioned, addressed

to Millers & Thompson, arrived in Liverpool on or about the 20th of March, 1855, after the assignment for the benefit of creditors.

The defendants obtained possession of those bills, and afterwards received the amounts thereof, that is to say, 106*l.* 2*s.*, and have hitherto refused to pay over any part thereof to the plaintiffs.

The question for the opinion of the court was, whether the plaintiffs are entitled to recover from the defendants the value or amount of the said bills.

If the court should be of opinion in the affirmative thereof, then judgment was to be entered against the defendants for 106*l.* 2*s.*, with interest thereon from the 27th of March, 1855, and costs, to be taxed.

If the court should be of a contrary opinion, then judgment of nonsuit was to be entered, with costs, to be taxed.

John Henderson, for the plaintiffs.(*a*)—By the *mortgage of a ship, accruing freight passes to the mortgagee, notwithstanding the requisites of the ship's registry acts have not been complied with: Dean *v.* M'Ghie, 4 Bingh. 45 (E. C. L. R. vol. 13), 12 J. B. Moore 185 (E. C. L. R. vol. 22); Kerswill *v.* Bishop, 2 C. & J. 529.† [CROWDER, J.—Here, the bills were paid before the mortgagees took possession of the ship.] The circumstance of bills having been given for the passage-money cannot vary the rights of the parties; neither can the accidental circumstance of the bills having arrived and been paid before the ship reached England make any difference. In Gardner *v.* Cazenove, 1 Hurlst. & N. 423,† which will probably be relied upon by the other side, the mortgagee had never taken possession of the ship; and the bill of sale made no mention of freight or passage-money. Here, however, they are specifically mentioned. It is submitted, therefore, that the plaintiffs, as mortgagees in possession of the ship, were entitled to the freight and passage-money,—that the deed of the 30th of November, 1854, conveyed the freight and passage-money to them, irrespectively of the title to the ship,—and that, without reference to the power of attorney, the master had authority to hypothecate the ship and her earnings for the repayment of the 4000*l.* advanced for necessary repairs. [*353

Mellish, for the defendants.(*b*)—The plaintiffs, as *mortgagees of the ship, were not entitled to recover passage-money received by the owners before they (the mortgagees) took possession of the ship. [WILLIAMS, J.—Upon what principle is it that the taking possession of the ship makes the difference?] If the mortgagors are allowed to be in possession, the contracts for freight are made with them. By abstaining from taking possession, the inference is that the mortgagees intend [*354

(*a*) The points marked for argument on the part of the plaintiffs, were as follows:—

"That the plaintiffs are entitled to the passage-money in question as incident to the ship of which they have taken possession under the deed of the 5th of August, 1854, or as transferred thereby in the words, all freight, passage-money, &c., or as conveyed by the deed of the 30th of November, 1854."

(*b*) The points marked for argument on the part of the defendants, were as follows:—

"1. That the plaintiffs were at most mortgagees who had not taken possession of the ship till after the money in question was paid; and that mortgagees have no claim either at law or in equity to freight or other profits of the thing mortgaged which have been received whilst the mortgagor is in possession:

"2. That the power of attorney did not give authority to execute any assignment having any greater effect on the freight than that of a mortgage of the ship; and that, if the deed of the 30th of November, 1854, was such as would have had any greater effect, it is not binding."

that the mortgagors shall be liable for the expenses of repairing and working the ship. In Gardner v. Cazenove, the Lord Chief Baron says: "It is established by the authorities that an owner is entitled to freight from the time that the ceremonies have been gone through which are necessary to transfer to him the title, so that he would have a right to all the freight which the ship was then earning. On the other hand, a mortgagee, though for many purposes an owner, is not entitled to the freight until he has taken possession." The circumstance of the money being passage-money for the voyage, and not freight, makes no difference. If the mortgagee allows the mortgagor to receive it, there is an end of his security pro tanto. Pre-payment of passage-money is usual. In Dean v. M'Ghie and Kerswill v. Bishop, the money had not been paid at the time possession was taken of the ship. The next question is, whether the mention of freight and passage-money in the deed of the 30th of November, 1854, makes any difference. The power of *355] *attorney only gave authority to mortgage *the ship*, not the freight and passage-money separate and distinct from the ship herself: and the plaintiffs had full notice of the terms of the power, for it was addressed to them as well as to Maine. Then, reliance is placed upon the assignment executed by the captain, who it is said had power to raise money upon the security of the ship. But, although the master has power to hypothecate the ship for advances for necessary repairs, he has no power at the same time and by the same instrument to pledge the personal credit of his owners for such advances: Stainbank v. Fenning, 11 C. B. 51 (E. C. L. R. vol. 73), affirmed by the Exchequer Chamber, Stainbank v. Shepard, 13 C. B. 418 (E. C. L. R. vol. 76), Erle, J., dissenting. Assuming that the mortgagee of a ship ordinarily has no interest in freight or passage-money until he has taken possession of the ship, does it make any difference that this is a specific mortgage of the freight and passage-money? No notice having been given by the mortgagees, the passage-money was paid. Can a mortgagee or assignee of a chose in action under such circumstances say that the mortgagor had no power to receive the money? [CROWDER, J.—The trustees under the deed of the 9th of February, 1855, cannot be in a better position than the mortgagors themselves. If the mortgagors had no right to receive the money in question except as trustees for the mortgagees, what right could the defendants have? ERLE, C. J.—Suppose a ship is mortgaged, and on her arrival with passengers,—the passage-money being payable on arrival,—the mortgagor goes on board and receives money from a passenger, would not money had and received lie against him at the suit of the mortgagee?] To be consistent, it must be contended that it would not. But that is a very different case from the present, where the money had been actually paid before *356] the arrival of the ship, and consequently before the *mortgagees had done any act indicating an intention to take possession of the ship.

Henderson, in reply.—All the authorities show that a mortgagee taking possession of a ship becomes entitled to all her earnings. As a general rule that is conceded here. If, therefore, these bills had not been taken for the passage-money, the plaintiffs would unquestionably have been entitled to receive the amount on the ship's arrival in Liverpool. The terms of the power of attorney were large enough to autho-

rize a mortgage of the ship and also of the freight and passage-money; and the right to the earnings of the voyage followed the beneficial interest. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

In this case the plaintiffs claim the passage-money of certain passengers carried from Australia to Liverpool in the Antelope. The defendants are assignees of the effects of the owners of the ship, and stand in the place of the owners for the purpose of this action. The plaintiffs' claim was rested, first, on the ground that they were mortgagees of the ship; but, inasmuch as the passage-money in question was an earning of the ship received by the mortgagors before the mortgagees took possession, we think that ground fails: Gardner *v.* Cazenove, 1 Hurlst. & N. 423.†

Secondly, the claim was rested on the ground of an assignment of the passage-money in question; and, as to this, two questions arise,—first, whether the power of attorney from the owners gave authority to assign the passage-money, and, secondly, whether the instrument relied on did operate to assign it.

*The material facts are that the owners gave a power of attorney authorizing their agents to do many acts for the owners, [*357 and, among others, "to sign any bottomry-bond or instrument of hypothecation on said vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage, or otherwise, as he shall think proper, the said vessel, or any share thereof, and to execute all instruments, and to do all acts which shall be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owners if present could have done." Under this power, the agent, by deed, reciting a mortgage of the ship, and the necessity for further advance to enable the ship to set sail, and the advance of 4000*l.* for that purpose by the plaintiffs, assigned all the freight, hire, and passage-money, and earnings of the said ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4000*l.* should be repaid. The ship sailed and arrived at Liverpool. After the ship had sailed, the agent of the owners received on behalf of the passage-money of some passengers, which had been so assigned, bills on England, which were paid, and the money received by the defendants, before the ship arrived; and the amount of these bills is the claim in this action.

Then, did the power of attorney authorize the assignment of the passage-money in question? The defendants contend that the power to mortgage authorizes only the usual mortgage of the ship itself, with the usual incident that the earnings should belong to the mortgagor till the mortgagee should take possession; and that therefore a mortgage of the passage-money, which is the same for this purpose as the freight, creating an immediate right thereto, was beyond the power, and void.

*But it appears to us that the power is not restricted in the manner so contended for. The context shows an intention to [*358 empower an attorney to do all the acts which the owner could do in respect of selling or mortgaging or hypothecating, according as need should require; and the words relating to mortgage or sale are absolute and in the amplest form. If it is objected that a power to mortgage

the ship does not extend to mortgage the freight, the answer is, that the freight is for many purposes part of the ship inseparably appurtenant thereto, and therefore that such a power as this to mortgage the ship extends to the freight. Thus, an assignment of the ship passes the right to the freight then in progress of being earned to the assignee of the ship, so that a subsequent assignee of the freight takes nothing, because the freight appertains to the ship: Morrison *v.* Parsons, 2 Taunt. 406. Also, in case of separate insurance on ship and freight, and separate abandonments, if the ship arrives and earns freight, the abandonee of the ship takes the freight as part of the ship, and the abandonee of freight takes nothing: Cave *v.* Davidson, 5 M. & Selw. 79.

If it is objected that this power to mortgage must be restricted to a mortgage leaving the earnings to belong to the mortgagor till his possession is changed, the answer is, that a mortgage of a ship in the usual terms is construed to have that effect, because all mortgages are presumed to be made with that intention unless the contrary is expressed. For, if the mortgagor bears the expense, it is thought reasonable that he should have the profits till the mortgagee intervenes: and this is put as the ground of the rule in all the cases from Chinnery *v.* Blackburne, 1 H. Bl. 117 n., 3 Doug. 391, Gardner *v.* Cazenove, above cited.

But it is clear also that the need of the ship may require a mortgage
*359] of the freight and other earnings to *accrue in the course of the voyage, as well as of the ship itself, not only from the facts of the present case, but also from those of many reported cases. In Gardner *v.* Cazenove, 1 Hurlst. & N. 423,† it is said in the judgment, that, if an instrument expressed a clear intention to mortgage the accruing freight, effect would be given to that intention. But the instrument there was construed not to have that effect, where the ship had been mortgaged and also the freight, and the freight had been received by the mortgagor. The question was raised whether the mortgagee was liable for necessaries supplied, as if he had been owner from the beginning of the voyage, and answered in the negative: Jackson *v.* Vernon, 1 H. B. 114. In Mestaer *v.* Gillespie, 11 Ves. 621, the ship and freight were mortgaged by the same instrument, and the mortgagor objected that the instrument was null, because there was no registry; but Lord Eldon, p. 629, declares that the mortgage of the freight was clearly valid, and was a well-known security; and he granted the injunction prayed for by the mortgagee. These cases show that a mortgage may create a right to the ship, leaving some right to the freight in the mortgagor; or it may create an immediate right to the freight in the mortgagee, if the parties so intend; and that the mortgage of the ship and freight may be in the same or a separate instrument.

It is evident that the need of the ship may be such that the voyage would be lost unless an advance could be obtained on the freight; and there is, therefore, ground to presume that the owner, giving a power to mortgage in ample words, would intend to authorize a form of mortgage well known to be often needed. The words were understood in this sense by the parties who respectively advanced and received money
*360] upon the faith of such understanding. If the words are *capable of the meaning so attached to them, we ought to give that effect to them which will make the instrument valid. And, on these

grounds, we consider that the power of attorney did authorize the instrument in question.

Then, the question remains; whether the instrument operated to pass an immediate right to the passage-money before the mortgagees took possession of the ship. We think it did.

The words express an intention to create an immediate assignment, and the circumstances indicate that the words were used in that sense; for, it is a further charge beyond the mortgage of the ship, to secure a further advance; and, unless it is construed to give an immediate right to the passage-money before taking possession of the ship, it has no operation, and gives no further security. Unless it is construed to give a right to the passage-money so as to prevent the owner or his agent from receiving that passage-money, he would have the option of rendering the security a nullity by receiving all for himself. If he assigned a right to the money, and afterwards received it, to defeat the operation of his own assignment, we think the money so received would be received to the use of the assignee; and, as the present defendants have the same rights and liabilities as the owners in respect of the plaintiffs' claim, we think, that, for the reasons above mentioned, they are liable to the plaintiffs for the passage-money which they have received on behalf of the owners. Stainbank *v.* Shepard decided that the master could not hypothecate the ship and freight and charge the owner personally in the same instrument; and that decision binds here, so as to prevent any effect from the master joining in the instrument hypothecating the freight. But the decision goes no further: it does not decide that the owner could not hypothecate *the ship and [*361 freight, and bind himself personally; and here the owners have authorized their attorney to bind them by any instrument of hypothecation by which they could be bound themselves.

Judgment for the plaintiffs.

HOLMES *v.* MITCHELL. *July* 9.

Since the 19 & 20 Vict. c. 19, s. 3, though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain the promise.

In a letter written by the defendant to the plaintiff, relating to a proposed mortgage, the following words are not a sufficient guarantee within the 4th section of the Statute of Frauds,—"I will take any responsibility myself respecting it, should there be any."

THIS was an action upon a guarantee.

The first count of the declaration stated that theretofore, in consideration that the plaintiff, at the request of the defendant, would advance and lend the sum of 400*l.* to one Hook Spooner and one William Cubitt, on interest, on mortgage of certain houses and land then belonging to the said Hook Spooner and William Cubitt, the defendant undertook and promised the plaintiff to take on himself any responsibility by the said Hook Spooner and William Cubitt incurred by the plaintiff by reason of the said loan on mortgage, and to indemnify and protect the plaintiff from and against all loss, costs, and expenses incurred or sustained by the plaintiff by reason of the said loan on mortgage: Averment, that the plaintiff, relying on the said undertaking and promise

of the defendant, did advance the said sum to the said Hook Spooner and William Cubitt, at interest, on the security of a mortgage of the said houses and land, and that afterwards, and before the commencement of this suit, the said principal sum and a large amount of interest thereon became due and payable by reason of the said loan and mort-
*362] gage from the said Hook Spooner and William *Cubitt to the plaintiff, and the said Hook Spooner and William Cubitt made default in payment thereof, and that the plaintiff had been necessarily put to heavy and great costs and expenses in trying to obtain payment of the said principal and interest so due and payable as aforesaid, by endeavouring to sell the said houses and land according to the provisions of the said mortgage, and otherwise, and that the said houses and land were of much less value than the said principal sum so lent as aforesaid, and altogether insufficient to indemnify the plaintiff from and against the loss, charges, and expenses of and relating to the said loan: Breach, that the defendant, although often requested so to do, and although all conditions precedent had been fulfilled, and everything had happened to enable the plaintiff to maintain this action, did not nor would discharge the said responsibility of the said Hook Spooner and William Cubitt to the plaintiff in respect of the said loan on mortgage, and did not nor would indemnify and protect the plaintiff against the loss, costs, and expenses incurred or sustained by him by reason of the said loan, and did not nor would pay to the plaintiff the said principal and interest and the said costs and expenses incurred and sustained by the plaintiff as aforesaid, or any part thereof, but wholly neglected and refused so to do, and the same were still due and payable to the plaintiff.

The second count was substantially the same as the first, but stated the consideration for the defendant's promise to be a transfer of 400*l.* stock by the plaintiff to the said Hook Spooner and William Cubitt: and the third count alleged the consideration to be the loan of money generally to Spooner and Cubitt.

The defendant, amongst other pleas, pleaded a denial of the alleged promise; whereupon issue was joined.

*363] *The cause was tried before Channell, B., at the Bristol Summer Assizes, 1858, when the following facts appeared in evidence:—The plaintiff having a sum of 400*l.* in the funds, was advised by the defendant to lend it on mortgage to two persons named Hook Spooner and William Cubitt, who carried on business as builders, upon the security of certain leasehold premises belonging to them; the defendant assuring the plaintiff that he would incur no risk, as the security was good for 600*l.*, and telling him that, if Spooner and Cubitt would not take less than 600*l.*, he, the defendant, would himself advance 200*l.* to make up the required amount. The defendant further promised to see his solicitor, Mr. Lyne, upon the matter: and shortly afterwards he addressed the following letter to the plaintiff:—

"Enfield Highway, October 21, 1856.

"Dear Charles,—I saw Mr. Lyne this morning, and I told him he had better call on you, as he seemed very anxious to have the mortgage completed, and I thought he offered very fair; but do as you please about it. *I will take any responsibility myself respecting it, should there be any.* "W. MITCHELL."

Shortly after the receipt of this letter, Mr. Lyne called on the plaintiff and told him that Spooner and Cubitt would be content to take the 400*l.*, and the plaintiff consented to lend it. Accordingly, he sold out the 400*l.* stock, and advanced the proceeds to Spooner and Cubitt upon the security before mentioned at 6*l.* per cent. interest,—solely upon the faith of the defendant's letter of the 21st of October, 1856.

The interest was not paid when it became due, and the security turned out to be very inadequate, and the plaintiff sustained a considerable loss, to recoup himself which he brought this action against the defendant.

*It was objected on the part of the defendant that the evidence did not sustain the declaration; and the learned Baron, being of this opinion, nonsuited the plaintiff,—reserving him leave to move to enter a verdict (for such sum as should be assessed by an arbitrator to be chosen between the parties), if the court should be of opinion that there was evidence to support the contract alleged in either count of the declaration; the court to be at liberty to draw such inferences from the facts as a jury might have drawn. [*364

Edwards, accordingly, in Michaelmas Term last, obtained a rule nisi, against which

Karslake (with whom was *Collier*, Q. C.), in Easter Term showed cause.—There was no consideration for the defendant's promise. The 3d section of the 19 & 20 Vict. c. 97,(*a*) although it dispenses with the necessity of showing a consideration upon the face of the document, does not dispense with the existence of a good consideration. There was no request by the defendant to the plaintiff to advance the 400*l.*; but merely a recommendation to him to see Mr. Lyne and endeavour to get 6*l.* per cent. for his money. The letter is a mere offer to become responsible: there was no acceptance of the guarantee by the plaintiff. In this respect the case is almost identical with M'Iver *v.* *Richardson, 1 M. & Selw. 557. There, a paper writing was given by the defendant to A. (to whose house the plaintiffs had declined to furnish goods on their credit alone) to this effect,—"I understand A. & Co. have given you an order for rigging, &c. I can assure you, from what I know of A.'s honour and probity, you will be perfectly safe in crediting them to that amount: *indeed, I have no objection to guaranty you against any loss from giving them this credit.*" This paper was handed over by A. to the plaintiffs, together with a guarantee from another house, which they required in addition, and the goods were thereupon furnished. It was held that the paper did not amount to a guarantee, there being no notice given by the plaintiffs to the defendant that they accepted it as such, or any consent of the defendant that it should be a conclusive guarantee. Lord Ellenborough, in delivering the judgment of the court, says: "We do not know on what kind of previous application the defendant signed it, nor is there any subsequent circumstance stated in the case from which it can be collected. The [*365

(*a*) Which enacts that "no special promise to be made by any person after the passing of this act, to answer for the debt, default, or miscarriage of another person, being in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written document."

paper, therefore, must be construed according to the plain natural import of its terms. The import is, that the party signing it understood that Anderson & Co. had given an order for goods amounting to about 4000*l.*; that this order remained unexecuted; and then, as if a question had been put to the defendant respecting the honour and probity of Anderson & Co., the defendant says,—I can assure you, from what I know of Anderson, you will be perfectly safe in crediting them to that amount; and then he adds,—indeed, I have no objection to guaranty you against any loss from giving them this credit; which words import, that, if application were made, he would guaranty: but no subsequent application was made; indeed, it appears that a guarantee was obtained *366] from *another house. A considerable period elapsed, and it was not made known to the defendant until the failure of Anderson & Co. that his paper had ever been communicated to the plaintiffs. Considering this a mere overture to guaranty, it appears to us that the defendant ought to have had notice that it was so regarded, and meant to be accepted, or that there should have been a subsequent consent on his part to convert it into a conclusive guarantee." So, in Mozley *v.* Tinkler, 1 C. M. & R. 692,† a guarantee was given in the following form,—"T. informs me that you are about publishing an arithmetic for him. I have no objection to being answerable as far as 50*l.*: for my reference apply to B.," signed "G. T." This memorandum was forwarded to the plaintiffs, who never communicated their acceptance of it to G. T. In an action against the latter on the guarantee, it was held that the plaintiffs, not having proved any notice of acceptance to the defendant, were not entitled to recover. Lord Abinger says: "The case of M'Iver *v.* Richardson is not so strong as the present to show that there was intended to be a suspension until something further should be done. That case has never been impugned, and the present comes clearly within the principle there established. The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice." [WILLES, J., referred to Andrews *v.* Garratt, 6 C. B., N. S. 262 (E. C. L. R. vol. 95).] In Gaunt *v.* Hill, 1 Stark. N. P. C. 10 (E. C. L. R. vol. 2), it was held that a written proposal to pay a moiety of the debt of another, if the creditor would at a specified time of meeting accept the proposal and discharge the debtor, is not binding unless the creditor accede to the terms in writing. So, in Symmons *v.* Want, 2 Stark. N. P. C. 371 (E. C. L. R. vol. 3), in an action on a guarantee, the plaintiff gave in evidence a letter in the handwriting of the defendant, but without date, in which the latter *367] stated,—"I have no objection to guaranty the *payment of the rent, as far as that of each quarter, during Mr. T. Want's continuance in possession:" he also proved that T. Want rented certain premises from him: and it was held, on the authority of M'Iver *v.* Richardson, that this was not sufficient, without showing that the plaintiff accepted the defendant's offer.

Edwards and *Holl*, in support of the rule.—Before the statute 19 & 20 Vict. c. 97, to establish a guarantee, the plaintiff was bound to prove both the consideration and the promise by written evidence: now, however, the consideration may be proved by parol, though the promise must still be evidenced by writing. [BYLES, J.—The *whole* of the promise must still appear in writing.] No doubt. Here the whole promise

is in writing. [WILLES, J.—Does it not come to this, that the memorandum which would before have satisfied the 17th section of the Statute of Frauds, will now satisfy the 4th section?] Yes. [BYLES, J.—The 3d section of the 19 & 20 Vict. c. 97 does not make a promise good which was not good before. Can the verbal consideration be imported into the promise?] The consideration may be attached to the promise by parol. [BYLES, J.—You want to incorporate the parol consideration into the written promise. This you cannot do.] Here is a clear and distinct promise. The writing is only a part of the contract: to make it complete, it is necessary to prove consideration. That may be done by parol. [BYLES, J.—Formerly, the consideration *in writing* might be looked at, not only to support, but to *explain* the promise. But the *parol* consideration cannot be looked at to explain the promise.] If that be the true construction of the 3d section of the 19 & 20 Vict. c. 97, the benefit it confers is shadowy indeed. [COCKBURN, C. J.—The statute intended to exclude parol testimony as to the terms of the promise itself. The *construction you contend for would raise a conflict of parol testimony as to the limit of the guarantee, which would be getting on the debateable ground from which the statute intended to exclude you. Is not the Statute of Frauds inexorable in that?] [*368 The court will fail to carry out the intention of the legislature, if less effect be given to the parol evidence of the consideration than was given before when the evidence of the consideration and of the promise were both in writing. In Chitty on Contracts, 6th edit., p. 446, it is said: "A guarantee will be good, although it may be doubtful whether it referred to a past or a future credit,—provided it appear from all the circumstances of the transaction that the parties contemplated the latter. And, in such cases, evidence is admissible to show what the transaction really was,"—citing Colbourn *v.* Dawson, 10 C. B. 765 (E. C. L. R. vol. 70), Steele *v.* Hoe, 14 Q. B. 431 (E. C. L. R. vol. 68), Edwards *v.* Jevons, 8 C. B. 436 (E. C. L. R. vol. 65), Goldshede *v.* Swan, 1 Exch. 154,† Broom *v.* Batchelor, 1 Hurlst. & N. 255,† Butcher *v.* Steuart, 11 M. & W. 857,† and Haigh *v.* Brooks, 10 Ad. & E. 309 (E. C. L. R. vol. 37). In Wilson *v.* Hart, 7 Taunt. 295 (E. C. L. R. vol. 2), 1 J. B. Moore 45 (E. C. L. R. vol. 4), it was held that the Statute of Frauds does not exclude parol evidence that a written contract for the sale of goods, purporting to be made between A., the seller, and B., the buyer, was on B.'s part made by him only as agent for C. In the case of a deed, you may show a consideration, although none appears upon the face of the deed: Mildmay's Case, 1 Co. Rep. 175 a. [WILLES, J. —Where one consideration is recited, you may show another which is not inconsistent with the deed. Thus, in Tull *v.* Parlett, M. & M. 472 (E. C. L. R. R. vol. 22), where a deed purported to be made "in consideration of esteem for A. T., and for divers other good considerations," it was held that evidence was admissible to show that it was made in consideration of an intended marriage with A. T. A deed is not within the Statute of Frauds. *That statute only applies to instruments which were binding by reason of the consideration appearing in writing.] [*369 The cases upon the subject of the admissibility of extrinsic evidence to explain a will are alluded to in the judgment of Tindal, C. J., in Miller *v.* Travers, 8 Bingh. 244 (E. C. L. R. vol. 21), 1 M. & Scott 342 (E. C. L. R. vol. 28). In Shortrede

v. Cheek, 1 Ad. & E. 57 (E. C. L. R. vol. 28), 3 N. & M. 866 (E. C. L. R. vol. 28), the plaintiffs brought assumpsit on the following guarantee, —"You will be so good as to withdraw the promissory note, and I will see you at Christmas, when you shall receive from me the amount of it, together with the memorandum of my son's, making in the whole 45*l.*" A promissory note for 35*l.*, made by the defendant's son, and payable to the plaintiff, was proved at the trial; but not the memorandum. The guarantee was proved, and a subsequent admission by the defendant that he had to pay the plaintiff 45*l.* due from his son. It was held,— first, that the plaintiff was not bound to produce the memorandum,— secondly, that the consideration, viz., the withdrawing of the note, was sufficiently stated to satisfy the Statute of Frauds, though the amount and maker's name were not specified; there being no evidence of any other note to which the agreement could apply. Parke, J., in the course of the argument there says,—"A guarantee is to receive its application from the state of facts as shown in evidence." [CROWDER, J.—Bateman *v.* Phillips, 15 East 272, is stronger in your favour than Shortrede *v.* Cheek. *Cur. adv. vult.*

WILLIAMS, J., delivered the judgment of the court:—

The question in this case is whether in a letter written by the defendant to the plaintiff relating to a proposed mortgage, the following words are a sufficient guarantee within the 4th section of the Statute of Frauds,—"I will take any responsibility myself respecting it should there be any."

*370] *It will be observed, that, at the time the letter was written, no mortgage existed. The letter is silent as to the sum to be advanced, as to the rate of interest, as to the nature of the security, whether a mortgage in fee or for years, and as to the land to be charged. The letter, if read by itself without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which these particulars were supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be. It cannot be made out without reference to previous conversations. In Shortrede *v.* Cheek, 1 Ad. & E. 57 (E. C. L. R. vol. 28), 3 N. & M. 866 (E. C. L. R. vol. 28), and in Bateman *v.* Phillips, 15 East 472, an existing document or an existing debt was referred to in the writing, so that evidence of oral statements was not necessary to explain the promise.

The recent statute 19 & 20 Vict. c. 97, s. 3, it is true, abrogates the rule laid down in Wain *v.* Warlters, 5 East 17, and enables a party to give parol evidence of the consideration for a guarantee. But a consideration expressed in writing formerly discharged two offices, it sustained the promise and might also explain it. Now, however, parol evidence, though it may supply the consideration, cannot go further, and explain the promise.

We therefore think the ruling of the learned judge at the trial was correct, and the rule must be discharged. Rule discharged.(*a*)

(*a*) See the remarks of Williams, J., upon the case in The North Staffordshire Railway Company *v.* Peke, 1 Ellis, B. & E. 1002 (E. C. L. R. vol. 96).

*POLLEN and Wife *v.* BREWER, Clerk. *May* 26. [*371

Pending a negotiation for an assignment of a lease, A. was (as the jury found) let into possession of the premises as tenant of some kind. The negotiation going off, B. (the landlord) demanded the key, and wrote to A. telling him that he never intended to let him into possession at all, and, A. refusing to go out, B. entered and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted:—Held, that, although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion,—his tenancy being at the most a tenancy at will, and that having been properly determined.

THE first count of the declaration charged an assault on the female plaintiff, the second (which was abandoned at the trial) the like with an allegation of loss of service, &c., the third an assault upon the male plaintiff, the fourth breaking and entering the plaintiff's dwelling-house and forcibly expelling him and his wife and family, and the fifth was trover.

The defendant pleaded not guilty.

The cause was tried before Williams, J., at the sittings at Westminster after last Term. The plaintiff swore, that, in May, 1858, he entered into a negotiation with the defendant for an assignment of a lease of certain premises which the defendant held, that the defendant agreed to let him into possession, and gave him the key, and that shortly afterwards the defendant went to the premises with two men, and assaulted the plaintiff and his wife, and turned them and their children and furniture into the street.

The defendant denied that he had ever agreed to let the premises to the plaintiff, but stated that he gave him the key for the purpose of enabling his agent to inspect the premises. He also denied the alleged assaults, and proved that, the plaintiff having refused to redeliver possession of the premises to him on demand, he entered and expelled him.

The jury, however, found that there was a tenancy of some sort, and that the alleged assaults were committed; and they found for the plaintiffs on the first count 20*s.* damages, on the third count 40*s.*, and on the fourth count 25*l.* The learned judge reserved leave to the defendant to move to reduce the damages by the last-mentioned sum, if the court should think *there was any evidence of a determination of the [*372 tenancy.

J. Jones, in Trinity Term last, moved for a new trial, on the ground that the verdict was against evidence; or to reduce the verdict by the 25*l.* given for the expulsion, on the ground that the plaintiff was a trespasser after the demand of possession. He submitted, that, at the most, the plaintiff was tenant at will, no terms having been concluded; and that, upon his refusal to redeliver possession on demand, he became a trespasser and might lawfully be expelled. [WILLIAMS, J.—It was not pretended that Pollen had any estate. I do not, however, think we can disturb the verdict upon the evidence; but you may take a rule to reduce the damages.]

Milward now showed cause.—The object of this rule is, to question the propriety of the decision in the case of Newton *v.* Harland, 1 M. & G. 644 (E. C. L. R. vol. 39), 1 Scott N. R. 474, where it was held by a majority of this court, that, where a tenant remains in possession

after the expiration of his term, his landlord is not justified in expelling him by force, in order to regain possession. That case has never been overruled; and this court will not now overrule it, but leave that to be done by a court of error. Here there might be a question whether the plaintiff was not tenant at will when he was expelled. There was no formal determination of the will. All that was proved was, that the keys had been sent for by the defendant, but the plaintiff refused to give them up. [BYLES, J.—The plaintiff was clearly a trespasser. ERLE, C. J.—The question is whether as a jury we can infer that the plaintiff was in with the consent of the landlord. The reservation was, to reduce
*373] the damages by the 25*l.*, if there was any evidence that *the will was determined. I think there was, and that the landlord had a right to enter and turn the plaintiff out.] The determination of the will is a question of intention; and the defendant could not be assumed to intend to determine a tenancy the existence of which he denied.

Jones was not called upon to support the rule.

ERLE, C. J.—I am of opinion that this rule must be made absolute to reduce the verdict by 25*l.*, the amount of damages found upon the fourth count. It is clear that the plaintiff had at the utmost only the interest of a tenant at will. I incline to think that the defendant never intended to create even that limited interest: but the jury have found it. The defendant, having a right to determine the plaintiff's possession at any moment, sent to demand the key, telling the plaintiff at the same time (by letter) that he was in against his will. I am of opinion that either of these was a sufficient intimation to the plaintiff that he was no longer tenant at will, and that his continuance of the possession was without a shadow of right, and therefore that the defendant was justified in treating him as a trespasser and removing him from the premises. There was abundant evidence that, at the time of the expulsion, the plaintiff was on the premises without any right. I therefore think the rule must be made absolute.

WILLIAMS, J.—I also think there was sufficient evidence of a determination of the will, and consequently that the plaintiffs are not entitled to recover damages for the expulsion.

CROWDER, J.—I am of the same opinion. I do not see what more the defendant could do than he did to determine what the jury have
*374] found to be a tenancy at *will. It is said that there was no proper determination of the tenancy, because the demand of possession or the key, was accompanied by an assertion that there never was any tenancy at all. I do not, however, see how that can cut down the evidence of determination. The defendant demands the key, then a correspondence ensues, and then he makes an entry. This was a clear intimation to the plaintiff of his election to determine any right he might have.

BYLES, J.—I also am clearly of opinion that the rule to reduce the damages should be made absolute. I have nothing to add to what has fallen from the rest of the court. Rule absolute.

FITZGERALD and Others *v.* DRESSLER. *Nov.* 18.

A., through the agency of B., a broker, sold a parcel of linseed to C., who through the same broker sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D. on the following day sent the broker a check for 900*l.*, on account,—the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. under his contract with C. was 971*l.* 15*s.* 6*d.*

In an action by A. against D. to recover the difference between that sum and the 900*l.* check:—Held, that the agreement by D.'s clerk was not a contract or promise to pay the debt of a third person within the 4th section of the Statute of Frauds, the seed, the giving up the delivery order for which was the consideration for that promise, being the property of D., subject only to A.'s lien for the contract price.

But held, by Williams, J., Crowder, J., and Willes, J. (Cockburn, C. J., dissenting), that, there being no evidence that D.'s clerk had communicated to him the bargain he had made with A.'s clerk when he obtained the delivery order, D. was not liable.

THE first count of the declaration was for money which the defendant agreed with the plaintiffs to pay to the plaintiffs, in consideration that the plaintiffs, at his request, and with the consent of the purchasers from the plaintiffs of certain goods upon which for the *price [*375 thereof the plaintiffs had a lien, delivered the said goods to the defendant.

There were also counts for goods sold and delivered, for interest, and for money due on accounts stated.

The defendant pleaded never indebted, whereupon issue was joined.

The cause was tried before Cockburn, C. J., at the sittings in London after Hilary Term, 1858, when evidence to the following effect was given on the part of the plaintiffs:—

On the 25th of September, 1855, the plaintiffs, who carried on business under the firm of Greenhill & Co., and were the importers of a cargo of linseed then on its way from Calcutta in a ship called the Pequot, sold such linseed to Messrs. Haakman & Co., through Messrs. Dale, Morgan & Co., brokers of the city of London, under the following contract:—

"London, 25th September, 1855.

"Sold this day for Messrs. Greenhill & Co. to Messrs. Haakman, Jansen & Co., the contents [G. & Co.] 682 bags Calcutta linseed, expected to arrive per Pequot from Calcutta, warranted of sound merchantable quality and of fair average of this season's shipments made at that port, at 74*s.* per quarter, duty free; to be worked and paid for in fourteen days from landing after arrival here, in ready money, allowing 2½ per cent. discount. Should the quality of the linseed on arrival here not turn out equal to the warranty specified above, be sea or otherwise damaged, or out of condition, this contract is not to be cancelled on that account, but the same to be taken with an allowance, to be fixed by the brokers.

(Signed) "DALE, MORGAN & Co., brokers."

On the 6th of November, 1855, and before the arrival of the linseed, Messrs. Dale, Morgan & Co. resold it for Messrs. Haakman & Co. to William Schenk, at the increased price of 75*s.* 3*d.* per quarter. The contract *of such resale to Schenk was in other respects similar [*376 to the contract of sale to Messrs. Haakman & Co.

On the 28th of December, 1855, and after the arrival of the ship, but before any part of the said linseed had been landed or worked, Messrs. Dale, Morgan, & Co. resold the linseed for Schenk to the defendant according to the following contract:—

"London, 28th December, 1855.

"Sold this day for William Schenk, Esq., to Mr. Gustavus Dressler the contents [G. & Co.] six hundred and eighty-two bags Calcutta linseed ex Pequot lying in the London Docks, of sound merchantable quality, per sample, at 77*s.* per quarter, to be worked and paid for in fourteen days, in ready money, allowing 2½ per cent. discount. Any damaged seed or sweepings in the above parcel of linseed to be taken with an allowance, to be fixed by the brokers.

(Signed) "DALE, MORGAN & Co., brokers."

It appeared, that, on the 2d of January, 1856, Lindsey Harvey, one of the defendant's junior clerks, who was only aged about sixteen, applied on behalf of the defendant to Mr. Morgan for a delivery order for the said linseed, when Mr. Morgan asked if he had brought the money for it, to which Harvey answered "No;" that Mr. Morgan then sent him with one of Dale, Morgan & Co.'s clerks to the office of the plaintiffs, where they saw one Gardiner, who, upon Harvey's stating that he had come for the delivery order, asked Harvey if he had brought a check, and, finding that he had not, told him that before the plaintiffs parted with the order they should require the money.

According to the plaintiffs' evidence, it appeared that Gardiner then went and consulted the plaintiff, Mr. Greenhill, as to whether he would take the clerk's promise to pay, and, obtaining his assent, Gardiner *377] asked Harvey whether the defendant would pay for the *seed, and, on Harvey's answering "Yes," Gardiner handed to him the order, which was in the following terms:—

"To the superintendent of the London Docks.

"1st January, 1855.

"Sir,—Please to deliver to Messrs. Dale, Morgan & Co. the undermentioned packages ex Pequot from Madras, entered by ourselves 18th December, 1855. All charges, and rent, if incurred, to prompt, to be paid by our deposit account.

"Marks, [G. & Co.].

"Particulars. The contents of six hundred and eighty-two bags of linseed (682 bags).

(Signed) "P. pro GREENHILL & Co.,
"THOMAS GARDINER."

Gardiner stated that the order had been made out by him on the first of January, and it was dated by mistake 1855 for 1856.

It further appeared that Harvey, on obtaining the order, took it to Mr. Morgan for his endorsement, and that Mr. Morgan, on being informed by Harvey that he had promised that the defendant should pay for the seed, and that he had obtained the order by that promise, endorsed the order in the name of his firm, and handed it to Harvey. This endorsement was necessary to enable the defendant to make use of the order. It was as follows:—"Deliver to Gustavus Dressler or order. DALE, MORGAN & Co."

On the following day, viz. the 3d of January, the defendant's check for 900*l.* was received by Dale, Morgan & Co., on account of the linseed.

Mr. Morgan stated, that he endorsed the delivery order, and handed it to Harvey, on his informing him he had obtained it, and that he did not hand it to him in exchange for the said check for 900*l.*; but he added *that he should have endorsed the order independently of Harvey's representations, and that he would have given credit to his possession of it. At this time the linseed had not been landed or paid for; and the precise quantity of it had not been ascertained. After the said delivery order had been endorsed and handed to Harvey, it was endorsed by Mr. Dumas, the defendant's managing clerk, and handed to the superintendent of the docks. The said linseed was afterwards landed and measured, and ultimately delivered to the defendant's orders. On the measuring being completed, Messrs. Dale, Morgan & Co. sent to the defendant, on the 11th of January, 1856, an account, from which it appeared that the contents of the 682 bags of linseed were 277⅜ quarters, and that, after allowing for damaged seed and sweepings, the sum payable by the defendant was 1017*l.* 10*s.* 4*d.*, against which credit was given for the 900*l.* check as paid on account. It appeared, however, that this 900*l.* was not credited by Messrs. Dale, Morgan & Co. to the plaintiffs or to Schenck, but that the plaintiffs had received at different times from Messrs. Dale various sums on account of the seed, amounting altogether to 900*l.* [*378

The price payable to the plaintiffs, according to the terms of the first-mentioned contract, was, 971*l.* 15*s.* 6*d.*, and at the trial the plaintiffs claimed 71*l.* 15*s.* 6*d.*, being the difference between such 971*l.* 15*s.* 6*d.* and the amount of the said check.

It appeared that Schenck had failed about the end of January, 1856, and that there were at that time outstanding accounts and contracts between him and the defendant.

Evidence was given on the part of the defendant, that, at the time when he received the delivery order, he did not know that Messrs. Haakman had anything to do with the seed, or that the plaintiffs were the *importers, or what were the terms of the plaintiffs' contract with Messrs. Haakman. It also appeared from the defendant's evidence, that the defendant had sold some linseed to Messrs. Soames, which had not at that time arrived, and that there was a pressing necessity for him to obtain delivery of the linseed in question, for the purpose of delivering it to Messrs. Soames in lieu of that which he had sold to them. [*379

It was denied by the defendant and his witnesses that Harvey had been authorized either by the defendant or Dumas to make any contract with the plaintiffs at all: but it was admitted that Dumas was the person who sent Harvey for the delivery order, telling him to follow it up and get the order, and that Dumas had authority to act for the defendant in such matters.

It also appeared that the defendant knew of the sending of the check, and that he had been consulted about it on the morning of the 3d of January, and had ordered it to be written out; and, according to the evidence on the part of the defendant, it was sent the same day the

order was obtained, for the purpose of getting such order, and was given by Harvey to Mr. Morgan, in exchange for such order.

It was, however, admitted by Harvey, that, when he first went to Messrs. Dale, Morgan & Co.'s office, he was informed that the order was with the importers, and that he might on that occasion have been informed who the importers were, and that they would not part with the order without a check; and that he might have told this to his employers.

It was objected at the trial by the counsel for the defendant, that there was no evidence of any authority from the defendant to Harvey to make the contract relied upon by the plaintiffs, and that any such authority was completely negatived by the evidence on the part of the
*380] defendant; and it was also objected *that the contract, if any, was, to pay Haakman's debt, and that there was no contract in writing to satisfy the Statute of Frauds.

The learned judge, however, declined to withdraw the case from the jury: and his Lordship left it to them to say whether the defendant had by himself or by any one having authority to act for him, promised the plaintiffs to pay the price payable to them for the linseed, or ratified any such promise made by Harvey.

The jury found this in favour of the plaintiffs, and thereupon a verdict was entered for them for 71*l.* 15*s.* 6*d.*, with leave to the defendant to move the court on the above points so taken by the defendant's counsel,—the court being at liberty to draw inferences of fact from the evidence not inconsistent with the finding of the jury, and, if necessary, to amend the declaration.

In pursuance of the leave so reserved, the defendant obtained a rule nisi to set aside the verdict and enter a verdict for the defendant, or a nonsuit, on the ground that there was not sufficient evidence that the contract relied upon by the plaintiffs was authorized by the defendant; that the contract should have been in writing; and that there was no proof of the goods having been delivered to the defendant as alleged in the first count.

Pigott, Serjt., and *Kemplay*, in Hilary Term, 1858, showed cause.—The first question is whether there is any evidence that Harvey, the defendant's clerk, made the promise declared on. It was expressly sworn by Gardiner, the plaintiffs' clerk, that he only consented to hand over the delivery order for the linseed to Harvey upon his making the promise to pay the contract price; and, although Harvey denied it, it was for the jury to say which of the two they believed.

*381] The next question is whether the defendant *authorized Harvey to make the contract, or ratified it when made. There was abundant evidence to warrant the jury in inferring that Harvey, on his return to the defendant's counting-house with the order, communicated to Dumas, the managing clerk, as it was his duty to do, the condition upon which he obtained it, and that Dumas by sending the check ratified and confirmed Harvey's act. Having already sold the linseed at an advanced price, it is obvious that the defendant had a strong interest in affirming what his clerk had done.

The only remaining question is, whether the case falls within the 4th section of the Statute of Frauds, which provides that no action shall be brought whereby to charge the defendant upon any special promise to

answer for the debt, default, or miscarriages of a third person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The statute is confined to cases where the answering for the debt, default, or miscarriage of another simpliciter is the subject of the promise, and has no application to a case like this, where the defendant has an interest; as, where the promise is made for the purpose of relieving property in which he is interested from a lien or charge. The rule is so stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 *e*, where the learned editor observes,—"There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether each particular case comes within this clause of the statute or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the *absence of any liability on the part of the defendant or his property, except such as arises from his express promise." In [*382 Williams *v.* Leper, 3 Burr. 1886, A., being indebted for rent, assigned his effects to the defendant in trust for his creditors; the defendant advertised a sale, and, on the landlord's threatening to distrain the effects, promised, that, if he would not distrain, he the defendant would pay the rent: and it was held that this promise need not be in writing. Lord Mansfield said: "The landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees 'that the goods shall be sold, and the plaintiff paid in the first instance.' The goods are the *fund*. The question is not between Taylor (the tenant) and the plaintiff. The plaintiff had a lien upon the goods. Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien. This has nothing to do with the Statute of Frauds. It is rather a fraud in the defendant to detain the 45*l*. from the plaintiff, who had an original lien upon the goods." This was confirmed by Lord Ellenborough in Houlditch *v.* Milne, 3 Esp. N. P. C. 86, where it was held, that, if a tradesman, having goods in his possession upon which he has a lien, parts with those goods on the promise of a third person to pay the demand, such promise is not within the Statute of Frauds. [CROWDER, J.—That case is the subject of some disparaging remarks in the notes to Forth *v.* Stanton.] It is not necessary to contend that the decision in Houlditch *v.* Milne proceeded on the correct ground. [WILLES, J., referred to Gregson *v.* Ruck, 4 Q. B. 737 (E. C. L. R. vol. 45).] In Couturier *v.* Hastie, 8 Exch. 40,† the plaintiffs, merchants at Smyrna, chartered a vessel to proceed to Salonica, and, having there loaded a cargo of Indian corn, to proceed to a safe port of the United Kingdom. The plaintiffs accordingly *shipped at Salonica 1180 quarters of Indian corn; and on the [*383 22d of February, 1848, the master signed a bill of lading making the corn deliverable "to order of the plaintiffs, or to their assigns, he or they paying freight as per charter-party." The plaintiffs endorsed the bill of lading and sent it together with the charter-party to B., their London agent, with orders to sell the cargo on their account; and they also, through B., insured the cargo "at and from Salonica to the port of discharge in the United Kingdom," &c., "corn warranted free from

average, unless general or the ship should be stranded." On the 1st of May, 1848, B. employed the defendants, corn-factors in London, to sell the cargo, and sent them the bill of lading endorsed, the charter-party, and policy of insurance; and they advanced 600*l.* on the cargo. The custom of corn-factors is to sell under a del credere commission, and, when so selling, not to mention the purchaser. On the 15th of May, 1848, the defendants sold the cargo to C., and sent him a bought note, which stated that he had bought of them "1180 quarters of Salonica Indian corn of *fair average quality when shipped*, at 27*s.* per quarter, *free on board, and including freight and insurance* to a safe port in the United Kingdom; payment at two months from this date, upon handing over shipping documents." On the same day the defendants wrote to B. advising him of the sale, but without making any mention of the purchaser or of commission. The vessel sailed from Salonica on the 23d of February; and, having met with tempestuous weather, the cargo became so heated and fermented that the vessel was obliged to put into Tunis Bay, where the cargo, having been surveyed, was found unfit to be carried further, and on the 24th of April it was sold. On the 23d of May, C. gave the defendants notice that he repudiated the
*384] contract, on *the ground that the cargo did not exist at the time of the sale to him. In March, 1849, C. became bankrupt. The plaintiffs brought the present action against the defendants to recover the price of the cargo, and declared specially on a del credere guarantee: and it was held that the defendants were responsible by reason of their del credere commission, although there was no guarantee in writing signed by them, since this was not an undertaking to pay the debt of another within the 4th section of the Statute of Frauds. In giving the judgment of the court upon this point, Parke, B., says: "Doubtless, if the defendants had for a per-centage guarantied the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them; but, being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them: and, though it may terminate in the liability to pay the debt of another, that is not the *immediate* object for which the consideration is given; and the case resembles in this respect those of Williams *v.* Leper, 3 Burr. 1886, and Castling *v.* Aubert, 2 East 325. We entirely adopt the reasoning of an American judge (Mr. Justice Cowen), in a very able judgment on this very point in Wolff *v.* Keppel, 5 Hill, N. Y. Rep. 458." (*a*) Although the decision in that case was reversed by the
*385] Exchequer Chamber (see 9 Exch. 102†) *upon another point (the decision of the Exchequer Chamber being affirmed by the House of Lords,—5 House of Lords Cases 673), the ruling of the court below upon this point remains untouched. In Eastwood *v.* Kenyon, 11 Ad. & E. 438 (E. C. L. R. vol. 39), 3 P. & D. 276, it was held that the 4th section of the statute contemplates only promises made to the person to

(*a*) See the judgment, 8 Exch. 56 (*c*).†

whom another is liable; and therefore a promise by the defendant to the plaintiff to pay A. B. a debt due from the plaintiff to A. B. is not within the statute. [WILLIAMS, J.—The statute only applies where the promise is made to the person entitled to the money.] The test suggested in the notes to Forth *v.* Stanton is well illustrated by the case of Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 430, coupled with Thomas *v.* Cook, 8 B. & C. 728 (E. C. L. R. vol. 15), 3 M. & R. 444. In the former of these cases it was held, that, if the plaintiff becomes bail to a stranger, in consideration of the defendant's request and of the defendant's promising him to indemnify him the plaintiff against the consequences, no action lies upon such promise, unless it be in writing; and the court refused to assent to the doctrine laid down in Thomas *v.* Cook, that a promise to indemnify does not fall within the words or policy of this statute. Williams *v.* Leper, 3 Burr. 1886, was recognised and acted upon in Bampton *v.* Paulin, 4 Bingh. 264 (E. C. L. R. vol. 13), 12 J. B. Moore 497 (E. C. L. R. vol. 22), and in Edwards *v.* Kelly, 6 M. & Selw. 204. In Hargreaves *v.* Parsons, 13 M. & W. 561,† the defendant and P. agreed for the sale by P. to the defendant of the "put or call" of 50 foreign railway shares, at a certain price per share premium, at any time on or before the 18th of February, 1844. Before that day, the defendant agreed to resell the option to the plaintiff, and to guaranty the performance of the agreement by P. On the 16th of February, the plaintiff *called* the shares (*i. e.* required *the delivery of them pursuant to the agreement), but it was at the same time verbally agreed between the defendant and P. [*386 that they should be delivered by P. to the plaintiff, not on the 18th of February, but on the 2d of March, at Paris. And it was held that this was not an agreement by the defendant to be answerable for the default of P., but an original promise by the defendant for the delivery of the shares by P., for which a note in writing was not required by the Statute of Frauds. Williams *v.* Leper and all the other authorities upon the subject are commented upon by Chief Baron Brady in Fennell *v.* Mulcahy, 8 Irish Law Rep. 434. There, the plaintiff having distrained the goods of his tenant, in consideration that he would withdraw the distress, the defendant undertook by parol to pay the amount of the rent due; the distress was thereupon withdrawn, and the goods left in the possession of the tenant: and it was held that this was a collateral undertaking to pay the debt of another, and, not being reduced to writing, was void by the Statute of Frauds. After referring to Williams *v.* Leper, 3 Burr. 1886, 2 Wils. 308, Bampton *v.* Paulin, 4 Bingh. 264 (E. C. L. R. vol. 13), 12 J. B. Moore 497 (E. C. L. R. 22), Edwards *v.* Kelly, 6 M. & Selw. 204, Read *v.* Nash, 1 Wils. 305, Castling *v.* Aubert, 2 East 325, Tomlinson *v.* Gell, 6 Ad. & E. 564 (E. C. L. R. vol. 33), 1 N. & P. 588 (E. C. L. R. vol. 36), Kirkham *v.* Marter, 2 B. & Ald. 613, Thomas *v.* Williams, 10 B. & C. 664 (E. C. L. R. vol. 21), 5 M. & R. 625, Houlditch *v.* Milne, 3 Esp. N. P. C. 86, and Green *v.* Cresswell, 10 Ad. & E. 453 (E. C. L. R. vol. 37), 2 P. & D. 430, and to the notes in 1 Wms. Saund. 211 *b*, *c*, the learned judge says,—"The first question here then is, what liability has the defendant incurred? Plainly none, except on this promise. He did not become a trustee or bailiff for the plaintiff. No goods were left in his hands, out of the produce of which he was to pay this debt." In Fennell *v.* Mulcahy, the whole benefit was

*387] to go to the debtor. *In Williams v. Leper, the party making the promise had an interest in the goods. This clearly is not the case of a promise to pay the debt of a third person: it was a mere bargain between the plaintiff and the defendant (who had an interest in the goods) irrespective of the debt of the third party. And by the passing of the delivery order to the defendant, Haakman & Co. were discharged. Rounce v. Woodyard, 8 Law Times 186, cited on moving,—where it was held, that a promise to guaranty certain arrears of rent, in consideration of the landlord's withdrawing a distress, was a promise to answer for the debt of another within the 4th section of the Statute of Frauds,—is to all intents and purposes the same as Fennell v. Mulcahy. Clancy v. Pigott, 2 Ad. & E. 473 (E. C. L. R. vol. 29), 4 Nev. & M. 496 (E. C. L. R. vol. 30), and Gull v. Lindsay, 4 Exch. 45,† also cited on the motion, have no material bearing upon the question.

Montagu Chambers, Q. C., and *Garth*, in support of the rule.—There was no evidence to go to the jury of any authority in Harvey, the clerk, to make the promise he did; nor was there any evidence that the fact of that promise having been made was ever communicated to the defendant or to his managing clerk, or that it received his confirmation.

Then, this was a promise to answer for the debt, default, or miscarriage of a third person, within the 4th section of the Statute of Frauds. The sum payable to Fitzgerald & Co. as the price of the linseed was a debt due to them from Haakman & Co.; and the consideration for letting the defendant have the delivery order, was, his promise to pay that debt. There was no debt due from the defendant to Fitzgerald & Co. Almost all the authorities are discussed in Fennell v. Mulcahy, which is precisely in point, and clearly distinguishable from Williams v. Leper,

*388] and that class *of cases. The true rule is that laid down in the notes to Forth v. Stanton, 1 Wms. Saund. 211 *d*, 211 *e*, which the learned editor sums up with these observations,—"There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be, that the question whether each particular case comes within this clause of the statute or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, together with the absence of any liability on the part of the defendant or his property, expect such as arises from his express promise." [WILLIAMS, J.—Was not the defendant's property subject to the plaintiff's lien in this case?] That was not an obligation affecting the property itself in rem. Williams v. Leper is the authority upon which all the modern cases rest. There, the tenant was insolvent, and had conveyed all his effects for the benefit of his creditors. The defendant was employed to sell the goods. The landlord came to distrain them for arrears of rent; whereupon the defendant promised him, that, if he would desist from so doing, he would pay him the amount. The goods thus continued in the defendant's hands charged with the debt. Lord Mansfield says: "The landlord had a legal pledge. He enters to distrain: he has the pledge in his custody. The defendant agrees that the goods shall be sold, and the plaintiff paid in the first instance. The goods are the *fund*. The question is not between Taylor (the tenant) and the plaintiff (the landlord). The plaintiff had a lien upon the goods. Leper (the defendant) was a trustee for all the creditors, and was

obliged to pay the landlord, who had the prior claim. This has nothing to do with the Statute of Frauds." And Wilmot, J., says: "This case is not within the spirit or meaning of the act. The *tenant was here the original debtor. The plaintiff had two remedies against him. The defendant (meaning 'the tenant') made a bill of sale of the goods liable to the plaintiff's distress. The plaintiff is *in possession* of the goods; having entered with intent to distrain them. Leper was the agent of the creditors. He makes this promise in order to *discharge the goods* of this distress. I consider this distress as being actually made. Leper says, 'If you will quit the goods and *disencumber the fund*, I will pay you.' Leper became the *bailiff* of the landlord: and, when he had sold the goods, the money was the landlord's in his *own bailiff's* hands." [*389 Bampton *v.* Paulin, 4 Bingh. 264 (E. C. L. R. vol. 13), 12 J. B. Moore 497 (E. C. L. R. vol. 22), proceeded upon the same ground, and was decided upon the authority of Williams *v.* Leper. Edwards *v.* Kelly, 6 M. & Selw. 204, likewise proceeded upon the same principle. Lord Ellenborough there says: "Perhaps this case might be distinguishable from that of Williams *v.* Leper, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand: the goods were put into their possession subject to this trust. So that, in substance, this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was, therefore, a consideration for this promise, partly falling within the authority of Williams *v.* Leper, partly within that of Read *v.* Nash, 1 Wils. 305." In Castling *v.* Aubert, 2 East 325, the plaintiff, a broker, having a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, the defendant promised that he would provide for the payment of those acceptances as they became due, upon the plaintiff's giving up to him such policies, in order that he might receive for the principal *the money due thereon from the underwriters; which was accordingly done, and the money was afterwards received by the defendant: and it was held that this was not a promise for the debt or default of another within the Statute of Frauds. Lawrence, J., there says: "This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay, if the plaintiff would furnish him with the means of doing so." [*390 Bird *v.* Gammon, 5 Scott 213, 3 N. C. 883 (E. C. L. R. vol. 32), was a case of trust. [WILLIAMS, J.—There, Lloyd, the original debtor, was discharged by the transaction.] Yes. As to Houlditch *v.* Milne, 3 Esp. N. P. C. 86, that case is only to be supported on the ground stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 *d*, viz., that the work was originally done upon the defendant's order. In Walker *v.* Taylor, 6 C. & P. 752 (E. C. L. R. vol. 25), the widow of a publican employed an undertaker to conduct the funeral of the deceased, and deposited with him the beer and spirit licenses of the house as a security for the payment of his bill. A., one of the firm of the distillers who supplied the house with spirits, by arrangement with the widow, took out administration; B., the other partner in the firm, promised the undertaker,

that, if he would give up the licenses to him, he would pay his bill for the funeral. It was held that the undertaker, having given up the licenses to B., might recover his bill against B., although the widow was his original employer, and although he had made out his account charging the administrator as his debtor. Tindal, C. J., said: "It is a new contract under a new state of circumstances. It is not 'I will pay, if the debtor cannot;' but it is 'in consideration of that which is an
*391] advantage to me, I will pay you this *money.' There is a whole class of cases in which the matter is excepted from the statute, on account of a consideration arising immediately between the parties. It is a new contract: it has nothing to do with the Statute of Frauds at all." Couturier *v.* Hastie, 8 Exch. 40,† 5 House of Lords Cases 673, was the case of a del credere agent, and not of a promise simpliciter to answer for the debt of another. What is the nature of the promise here? To constitute a promise to answer for the debt of another, must it not be a promise to pay the same amount and under the same conditions as the original debtor was liable to? Here, the debt due from Haakman & Co. was not at the time ascertained: it was not even ascertainable; for, the linseed had not been measured. The giving up of the lien does not take the case out of the statute, unless it were under such circumstances as would bring it within the rule in Williams *v.* Leper, 3 Burr. 1886. [WILLIAMS, J.—Was not the property here subject to the lien?] The question is whether the property was subject to pay the amount after the promise. [WILLIAMS, J.—Williams *v.* Leper, if looked at closely, *was* within the statute. The threat to distrain was treated as tantamount to an actual distress. The court got the case out of the statute by saying it was a purchase by the party of a lien upon his own property. That is this case. In Edwards *v.* Kelly, 6 M. & Selw. 204, the promise was absolute.] There, the defendant had no interest in the goods. The present case, it is submitted, is clearly distinguishable from all the others.

COCKBURN, C. J.—Two points have been made in this case,—first, that there was no evidence of authority on the part of the defendant's clerk, Harvey, to make the promise upon which the defendant is sought
*392] to be made liable, that is, that there was no evidence of *any antecedent authority in the clerk to make the contract, nor any evidence of subsequent ratification by the defendant of the contract so made,—secondly, that, supposing the contract is assumed to have been made with the defendant's authority, he is not liable, inasmuch as the case falls within the 4th section of the Statute of Frauds.

We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to Forth *v.* Stanton, 1 Wms. Saund. 211 *e*, where the learned editor thus sums up the result of the authorities,—"There is considerable difficulty in the subject, occasioned perhaps by unguarded expressions in the reports of the different cases; but the fair result seems to be that the question whether each particular case comes within this clause of the statute (s. 4) or not, depends, not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualifi-

cation at the conclusion of the passage; for, though I agree that the consideration alone is not the test, but that the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz., an absence of prior liability on the part of the defendant or his property,—it being, as I think, truly stated there as the result of the authorities, that, if there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of *fact his own or is property in which he has some interest, the case is [*393 not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I therefore agree with my learned Brothers that this case is not within the Statute of Frauds. The linseed in question had been sold to Haakman & Co., and by them to Schenck, and by Schenck to the defendant, and was therefore at the time of the alleged promise the property of the latter, subject to the plaintiffs' lien for the price. The defendant, therefore, had a property in the seed, the giving up by the plaintiffs of their lien thereon being the consideration for the defendant's promise to pay the contract price: consequently the case falls clearly within the qualification at the end of the note in 1 Wms. Saund. 211 *e*.

As to the other point, viz., whether there was evidence of the authority of the clerk Harvey to make the promise declared on so as to bind the defendant, I regret to find that my opinion stands in conflict with that of the other members of the court. It is unnecessary to go into any minute consideration of the facts: the simple question is whether there was any evidence for the jury of such authority. The finding of the jury in favour of the plaintiffs seems to me necessarily to involve this, that they find the fact to be as represented by the witnesses for the plaintiffs, viz., that the promise was actually made by the defendant's clerk. As to that, I apprehend, there is no diversity of opinion. The fact was controverted at the trial; but the verdict shows that the jury gave credit to the plaintiffs' witnesses. Then, if the fact be that the defendant's clerk when he obtained the delivery *order for the [*394 seed did enter into the contract upon which the action is founded, when that is coupled with the fact that the defendant had a most pressing necessity for the seed, and that he, or his managing clerk, sent Harvey to obtain the delivery order,—although I do not quite agree with the plaintiffs' counsel that that involved an authority to the clerk to enter into any engagement on the defendant's part which might enable him to carry out his instructions, still, with the greatest possible deference to the view entertained by the other members of the court, I think it is impossible not to come to the conclusion that the clerk Harvey, on returning to the defendant's counting-house, communicated to the defendant what had passed between him and Gardiner, the plaintiffs' clerk. I think it was so palpable and almost necessary that such communication should have taken place, that the jury were warranted in coming to the conclusion that the promise made by the defendant's clerk was confirmed and ratified by him. Though perhaps not very

strong, I think there was some evidence upon which the jury might fairly and reasonably come to the conclusion they did, and therefore that the verdict ought not to be disturbed.

WILLIAMS, J.—As to the first point, I agree with my Lord that the case is not within the 4th section of the Statute of Frauds. At the time the promise was made, the defendant was substantially the owner of the linseed in question, which was subject to the lien of the original vendors for the contract price. The effect of the promise was neither more nor less than this, to get rid of the encumbrance, or, in other words, to buy off the plaintiffs' lien. That being so, it seems to me that the authorities clearly establish that such a case is not within the statute.

*395] The case of Williams *v.* *Leper, 3 Burr. 1886, proceeded upon this, that the defendant there had an interest in the property: his property was encumbered by the landlord's claim for rent; therefore, the promise was a promise to pay a debt to which that property was subject, and not simply a promise to answer for the debt or default of another, within the meaning of the statute. This is in accordance with the cases of Castling *v.* Aubert, 2 East 325, and Anstey *v.* Marden, 1 N. R. 124, which, as is stated in the note to which my Lord has referred, were decided not to be within the statute, "on the ground that there was in both cases a purchase of an interest, not a mere undertaking to pay the debt of another."

As to the other point, I regret to say that I have the misfortune to entertain a different opinion from that expressed by my Lord Chief Justice. There was, no doubt, ample evidence that the clerk Harvey made the promise: but the question is whether there was any evidence that he was authorized by the defendant or by his managing clerk Dumas (who for this purpose must be taken to be the defendant himself) to make any such promise. Now, there was no direct evidence that Dumas ever knew that the promise had been made: but the way in which it was put at the trial was this, that, upon the evidence as it stood, the jury were justified in inferring that Harvey communicated to Dumas the terms upon which alone he could obtain the delivery order, and that Dumas ratified the promise so made and so communicated to him, by sending the check to the brokers in pursuance of the promise. I am quite prepared to admit, that, inasmuch as Harvey, in pursuance of the instructions of Dumas, had succeeded in obtaining the delivery order, it is extremely probable that he told Dumas on his return, that, in order to obtain it, he was forced to make the promise he did. That, however,

*396] is a thing which is *only *probable*, whereas what is required here is positive proof of the fact, or circumstances from which it may be legitimately inferred that the promise was ratified by Dumas. Where the burthen of proof lies upon the plaintiff, there must be something more than mere probability, or even strong probability: there must be facts from which the inference of authority may legitimately be drawn. Unless it can be inferred that the fact of the promise having been made by Harvey was communicated to Dumas, it seems to me that the sending of the check was perfectly immaterial and valueless; for, it is equally consistent with his ignorance as with his knowledge of the promise having been made that he should have sent the check to Dale, Morgan & Co. There was no promise to pay at any particular time; therefore, the sending of the check was just as consistent with its being

sent in the ordinary course of business as with its being sent in fulfilment of the promise made by Harvey. It seems to me that it would be very unsafe to say, that, because there is a strong probability of the existence of a state of things from which a prior authority or a subsequent ratification might be inferred, a jury would be warranted in acting upon it as if there were strict legal proof. Upon these grounds, I am of opinion that the rule to enter a nonsuit should be made absolute.

CROWDER, J.—As to the first point, I am of opinion that the promise declared on was not a promise to answer for the debt, default, or miscarriage of another, within the Statute of Frauds. The matter has been so fully gone into by my Lord and my Brother Williams that I do not consider it necessary to add anything.

As to the other point, after much consideration, I find myself unable to come to any other conclusion *than that there was no evi- [*397
dence of any authority in the clerk Harvey to make the promise he did make. Now, the authority for that purpose was capable of being shown either by proof of a previous authority or by proof of a subsequent ratification of the act of Harvey. The argument on the part of the plaintiffs put it both ways. They say that the instructions given by Dumas to Harvey to obtain the delivery order, authorized him to do that without which he could not have obtained it, viz., to make the promise he did. It is clear, however, that that was not sufficient to show an authority in Harvey to make the promise. Then arises the question whether there was any ratification by Dumas of that which Harvey had done. It must be assumed that the promise was made by Harvey: the jury have so found. But, upon the evidence, there is a total absence of any positive ratification. There is nothing shown of any communication between Harvey and Dumas which amounts to a ratification. To establish a case of authority by ratification, there must be some substantive proof; it must not rest upon probability or conjecture. Now, the only evidence I can discover of any approach to ratification, is, that, after Harvey had obtained the delivery order from Gardiner, Dumas writes out and sends to Dale, Morgan & Co., the brokers through whom the sale was effected, a check for 900*l.*, the approximate amount of the contract price. If that act of sending the check could be naturally referred to the promise made by Harvey, and the communication of that fact by Harvey to Dumas, it would have been some evidence of ratification to go to the jury: but I agree with my Brother Williams that the fact of the sending of the check was consistent with a transaction in the ordinary course of business, and did not afford any reasonable evidence to show that Dumas was actuated *by, or that he had any [*398
knowledge of, the promise made by Harvey. I also agree with my Brother Williams, that, if the promise had been to pay at a particular time, or immediately on receipt of the delivery order, the sending of the check might have been some evidence of ratification. But here the promise was general, and would be satisfied by payment at any time. The strong probability therefore seems to me to be, that the sending of the check was a thing done in the ordinary course of business, and not in consequence of a communication by Harvey to Dumas of the promise which had been made. The whole case on the part of the plaintiffs rests upon conjecture: and I see no evidence which would have justified the

jury in coming to the conclusion that Dumas had notice of and ratified the unauthorized promise made by Harvey.

WILLES, J.—I also am of opinion that the rule to enter a nonsuit in this case must be made absolute. Upon the first point we are all agreed, and I do not think it necessary to say more than that I think the Statute of Frauds is altogether inapplicable to such a promise as this. Upon the other point, I am clearly of opinion that there was no evidence that the defendant or his managing clerk Dumas authorized or ratified the promise made by Harvey. If Harvey had been the defendant, and the question had arisen whether there was any evidence of his having communicated to his employer the fact of his having made the promise, it would have presented a very different aspect. When dealing with the acts of a third person, it is not competent to the jury to act upon probabilities. There being no original authority in Harvey to make the promise, it was a thing done by him out of the ordinary scope of his
*399] duty; and, though there was *a moral duty cast upon him to communicate to his employer the fact of his having made the promise, it was nothing more than a moral duty; and the rule Omnia præsumuntur ritè esse acta donec probetur in contrarium, is never applied to such a duty as that. There is, therefore, no presumption either that Harvey did or did not perform that duty: and, in the absence of positive evidence that the promise was communicated to the defendant or to Dumas, the jury would not have been warranted in assuming that it was, merely because the evidence was equally consistent with either supposition. My opinion is founded upon this, that there is no presumption, and no principle of law by which the jury could be justified in arriving at a conclusion against the defendant, that Harvey performed a duty which was out of the scope of his authority. The fact of the check having been sent by Dumas on the following day cannot affect the question. There was nothing to show that that was not a transaction in the ordinary course of business. Rule absolute for a nonsuit.

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*400] *In the matter of THE NORTH BRITISH AUSTRALASIAN COMPANY (LIMITED) and THE JOINT STOCK COMPANIES ACTS, 1856 and 1857, Ex parte ROBERT SWAN.

A holder of shares in a joint stock company, by intrusting his broker with blank transfers signed by him, and affording him an opportunity of obtaining access to a box containing the certificates for the shares, enabled him by forgery and fraud to induce the company to register the transfers of the shares in the names of bonâ fide purchasers. A motion under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, ss. 8, 9, to rectify the register by replacing thereon the name of the original shareholder, failed; the court being equally divided,—Erle, C. J., and Keating, J., holding that the applicant had precluded himself by his negligence from availing himself of the equitable jurisdiction of the court under the statutes; Willes, J., and Byles, J., holding that the property in the shares had not been changed by the forged transfers.

HURLSTONE, in Easter Term last, on behalf of Mr. Robert Swan, obtained a rule calling upon the North British Australasian Company (Limited) to show cause why this court should not order the register of shareholders in the said company to be rectified by replacing thereon the name of Robert Swan as a shareholder therein from the time his

name was removed from the said register, in respect of the shares in the affidavit of the said Robert Swan mentioned or referred to.

The motion was founded upon the affidavits, amongst others, of Mr. Swan, Mr. Ker, his attorney, Robert Shepherd, and Caroline Bourne.

Mr. Swan's affidavit was in substance as follows:—That, in the year 1854, I purchased 700 shares in the British Australasian Company, which is a joint stock company registered, with limited liability, under the Joint Stock Companies Act, 1856. In the year 1857, I purchased 300 other shares in the said company, and thereupon I became and was the holder of 1000 shares in the said company, numbered 156735 to 157434, 115204 to 115403, 177206 to 177305; and my name was entered on the register of the said company in respect of the said shares, and so continued on the said register until it was without my consent or knowledge removed by the said company, as hereinafter mentioned.

That, for upwards of five years, I employed as my broker in the purchase and sale of shares one William Lemon Oliver, of, &c. I placed the said 1000 shares in *the said company, together with other securities, in a box, which I caused to be deposited with the London and County Bank for safe custody; and he received from the bank the following receipt on account thereof,—"London and County Bank, 21 Lombard Street, 15th November, 1856. Mr. W. L. Oliver has this day deposited a box on account of Mr. R. Swan, of Alnwick. James Gray, Accountant." I locked this box with a key which I kept, to the best of my belief, and saw the said 1000 shares in the said box in the month of November or December, 1857. [*401

That, in the month of October last, the said W. L. Oliver was brought before a magistrate on a charge of embezzling a sum of 5000*l.*, the money of one Caroline Adelaide Dance, of Southsea, Hants; and then I for the first time discovered that the said shares had been taken out of the said box, and that my name had been removed from the said register of shareholders, in manner hereinafter mentioned.

That, on or about the 15th of January, 1858, the said W. L. Oliver feloniously stole, took, and carried away 500 of the said 1000 shares in the said North British Australasian Company, numbered 156735 to 157234, and delivered the same to one Horace Barry. I have been informed and believe, that, on or about the 18th of January, 1858, the said Horace Barry delivered to the directors of the said company a paper partly written and partly printed, and purporting to be a deed of transfer by me to the said Horace Barry of the said 500 shares, and that the said Horace Barry claimed to have the same transferred to his name as the owner thereof; and that thereupon the secretary of the said company caused my name to be removed from the said register of shareholders, and the name of the said Horace Barry to be placed thereon in respect of the said 500 shares. I have since searched the said *register, and found that my name had been removed therefrom, and the name of Horace Barry placed therein in respect of the last-mentioned shares. I never executed any deed of transfer of the said 500 shares, or any of them, to the said Horace Barry or any other person; and the said alleged deed of transfer is a false and fraudulent document, concocted by the said W. L. Oliver as hereinafter mentioned. [*402

That, on two occasions, I employed the said W. L. Oliver as such

broker to sell for me some shares which I then possessed in the Scottish Australian Investment Company, for the transfer of which *six* deeds of transfer only were required; nevertheless, the said W. L. Oliver, by false and fraudulent representations, obtained from me *eight* blank forms of transfer with my name and seal attached thereto (a copy of which was annexed). At the time I gave the said blank forms of transfer to the said W. L. Oliver, on some of them there was not any attestation of the execution thereof. The said W. L. Oliver fraudulently made use of one of the said blank transfers, and interlineated the same by writing therein and thereon certain words so as to cause the same to appear to be a deed of transfer by me to the said Horace Barry of the said 500 shares in the said North British Australasian Company; and the said W. L. Oliver also wrote on the said blank transfer certain words purporting to be an attestation of the execution by me of the said alleged deed of transfer, and signed by one Caroline Bourne; but the signature of the said Caroline Bourne was forged by the said W. L. Oliver.

That I never gave the said W. L. Oliver, or any other person, any authority whatever to fill up the said blank transfer in the manner hereinbefore mentioned, or to use the same for any purpose whatever, except for the transfer of the said shares in the said Scottish Australian Investment Company.

*403] *That I never delivered as my act and deed, nor did I ever authorize the said W. L. Oliver or any other person to deliver as my act and deed, the said alleged transfer or any other transfer of the said 500 shares to the said Horace Barry.

That one of the regulations of the North British Australasian Company provides that shares may be transferred by deed in manner approved by the directors; and I am informed and believe that the form of deed approved by the directors has an attestation of the execution thereof.

That, on or about the 23d of July, 1858, the said W. L. Oliver feloniously stole, took, and carried away the other 500 of the said 1000 shares in the said North British Australasian Company, numbered 157235 to 157434, 115204 to 115403, 177206 to 177305, and delivered the same to the London and County Bank. I have been informed and believe, that, on or about the 23d of July, the said London and County Bank caused to be delivered to the secretary of the said company a paper partly printed and partly written, and purporting to be a deed of transfer by me to William M'Kewan and James Gray of the said last-mentioned 500 shares, and that the said London and County Bank claimed to have the same transferred to the said William M'Kewan and James Gray; and that thereupon the secretary of the said company caused my name to be removed from the said register, and the names of the said William M'Kewan and James Gray to be placed thereon in respect of the said last-mentioned 500 shares. I have since searched the said register, and found that my name had been removed therefrom, and the names of the said William M'Kewan and James Gray placed thereon in respect of the said last-mentioned shares. I never executed any transfer of the said last-mentioned shares or any of them to the

*404] *said William M'Kewan and James Gray, or either of them, or to any other person, or to the London and County Bank; and

the said last-mentioned deed of transfer is a false and fraudulent document, executed by the said W. L. Oliver as hereinafter mentioned.

That the said W. L. Oliver fraudulently made use of another of the said blank transfers hereinbefore mentioned, and interlineated the same by writing therein and thereon certain words so as to cause the same to appear to be a transfer by me to the said William M'Kewan and James Gray of the said last-mentioned 500 shares; and the said W. L. Oliver also wrote on the said last-mentioned blank transfer certain words purporting to be an attestation of the execution by me of the said last-mentioned alleged deed of transfer, and signed by one Caroline Bourne at Paris, and which last-mentioned pretended attestation was not signed by the said Caroline Bourne, but the signature of the said Caroline Bourne was forged by the said W. L. Oliver.

That I never gave the said W. L. Oliver or any other person any authority whatever to fill up the said last-mentioned blank transfer in the manner hereinbefore mentioned, or to use the same for any purpose whatever except for the transfer of the said shares in the said Scottish Australian Investment Company.

That I never delivered as my act and deed, nor did I ever authorize the said W. L. Oliver or any other person to deliver as my act and deed, the said last-mentioned alleged transfer or any other transfer of the said last-mentioned 500 shares to the said William M'Kewan and James Gray or either of them, or to any other person, or to the said London and County Bank.

That, at a session holden at the Central Criminal Court on the 22d of November last, I prosecuted the said W. L. Oliver for feloniously stealing, taking, and carrying away the said 1000 shares, and forging the *signature of the said Caroline Bourne as hereinbefore mentioned; and the said W. L. Oliver was then convicted of the said [*405 offences, and sentenced to twenty years' penal servitude.

And that I was present at the examination of the said W. L. Oliver before the magistrate who committed him for trial, and heard the testimony of the witnesses,—a copy of which, and of the conviction, were exhibited.

Mr. Ker's affidavit set out a correspondence which he had had with the secretary of the North British Australasian Company, in which the latter declined to accede to his demand to have Mr. Swan's name restored to the register, and also verified a copy of the rules and regulations of the company.

Sheppard's affidavit stated that the form of transfer referred to in Swan's affidavit was the form prescribed by the rules of the company.

Caroline Bourne in her affidavit stated that neither the attestation nor the signature to the deeds of transfer referred to was in her handwriting, nor did she ever witness such documents.

The application was rested upon the 25th section of the 19 & 20 Vict. c. 47, and the 8th and 9th sections of the 20 & 21 Vict. c. 14. The 25th section of the former act enacts, that, "if the name of any person is without sufficient cause entered or omitted to be entered in the register of shareholders of any company, such person, or any shareholder of the company, may, as respects companies registered in England or Ireland, by motion in any of Her Majesty's superior courts of law or equity, and, as respects companies registered in Scotland by

summary petition to the court of session, apply to such court for an order that the register may be rectified, and the court may either refuse *406] such application, with or without costs, to be paid by the *applicant, or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and, if the company make default or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay, for the amount of damage he may thereby have sustained." The 8th section of the 20 & 21 Vict. c. 14 enacts, that, "if the name of any person is without sufficient cause entered or omitted to be entered in the register of stock of any company, such person, or any holder of stock in the company, may apply to have the register rectified in manner directed by the 25th section of the principal act." And the 9th section enacts that "the court may, in any proceeding under the 25th section of the principal act, decide on any question relating to the title of any person who is a party to such proceeding to have his name entered in or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company, and generally the court may in such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

The cases of Dalton *v.* The Midland Railway Company, 13 C. B. 474 (E. C. L. R. vol. 76), and Tayler *v.* The Great Indian Peninsular Company, 28 Law J., Ch. 285, 709, were cited.

A difficulty being suggested as to the parties who should be called upon by the rule, *Hurlstone* prayed the advice of the court.

WILLIAMS, J.—We cannot bind ourselves or the parties by any preli- *407] minary opinion upon that point. You *must exercise your own discretion on the matter. It certainly does seem strange that the rights of third parties,—subsequent transferees included,—should be affected without their having had an opportunity of being heard.

The rule having been drawn up calling upon the company only,

Hawkins, Q. C., in Trinity Term, 1859, on behalf of the company, took an objection to the rule, as not calling upon the proper parties. He submitted that it ought to have called upon the now shareholders to show cause, it being most important to the company that the matter should be litigated between the parties really interested; that the transfer of the shares from Mr. Swan's name was effected by an instrument bearing the genuine signature of Swan, and apparently complying with all the requirements of the company's rules and regulations, and the transferees being bonâ fide purchasers for value, having no notice of Oliver's fraud. [BYLES, J.—The transfers were obtained by means of the fraudulent misapplication of a genuine signature, which would amount to a forgery.] As against the company, Swan is estopped from saying that the deed is an inoperative instrument. [COCKBURN, C. J.—Suppose it to be quite clear that the transfers are void, how then?] There would be the more reason that the parties claiming under them should come in and be bound by the decision of the court. [COCKBURN, C. J. —To whom do you say that notice should be given?] To those persons

whose names are now upon the register; and also, perhaps, to the immediate transferees.(a) [COCKBURN, C. J.—To direct the company [*408
*to restore the name of Swan would be to displace the names of the other parties, which would be prejudicing them without giving them an opportunity of being heard. BYLES, J.—I think the rule should be amended by calling also upon the parties who are now upon the register, or who have been on the register.]

Knowles, Q. C., contrà.—If the question had arisen respecting stock transferred by means of a forged power, the Bank of England would have been the only persons liable. The company here are the only persons of whom Mr. Swan has any knowledge. In Dalton *v.* The Midland Railway Company, 12 C. B. 458 (E. C. L. R. vol. 74), where a similar question arose as to railway shares, the court refused to allow the company to interplead. It is no answer for the company, when charged with having improperly removed a subscriber's name from the register, to say that they cannot restore it because the rights of sub-transferees have intervened.

COCKBURN, C. J.—This is an application to the discretion of the court; and we must look at all the surrounding circumstances to see how justice may best be done. I think the rule should be amended, and served upon the persons whose names now appear upon the register.

WILLIAMS, J.—The 9th section of the 20 & 21 Vict. c. 14 enacts that the court may, in any proceeding under the 25th section of the 19 & 20 Vict. c. 47, decide on any question relating to the title of any person who is a party to such proceeding,—whether such question arises between two or more holders or alleged holders of shares or stock, or between any holders or alleged holders of shares or stock and the company; and generally the court may in such proceeding decide any question that *it may be necessary or expedient to decide for [*409
the rectification of the register. The legislature, therefore, considers that two sorts of questions and controversies may arise. To which class of disputes does this belong? If to the former, we clearly ought to have before us all the parties whose interests may be affected by the decision we may come to.

The rest of the court concurring, the rule was ordered to be amended, and it was accordingly amended by calling upon the following persons, in addition to the company, to show cause,—Thomas Haines, John Frederick Frederickson, James Punch, Scarlett Lloyd Parry, Margaret Ann Lever, Bryan Ward Gibbins, Martha M'Auliffe, Charles Wellington Howell, and Isaac Tracey, jun.,—they being respectively registered as the present holders of shares in the said company formerly standing in the name of the said Robert Swan.

The affidavits upon which cause was shown against the rule were those of David Budge, the secretary of the company, William M'Kewan and James Gray, officers of the London and County Bank, and Horace Barry, the original transferee of 500 of the shares.

The affidavit of David Budge was as follows:—That, previous to the 15th of January, 1858, Robert Swan was the registered proprietor of 1000 shares in the North British Australasian Company, numbered 156735 to 157434, 115204 to 115403, and 177206 to 177305.

That, on or about the 16th of January, 1858, deponent received a

(a) To these latter notice of the rule had been given.

transfer deed, with the certificate of shares therein mentioned, and a request from Horace Barry in the deed mentioned that the same should *410] be registered by the company in the name *of the said Horace Barry. The transfer deed and certificate were as follows:—

"Transfer, No.

"I, Robert Swan, of 4, Austin Friars, gentleman, in consideration of the sum of 375*l.* paid to me by Horace Barry of the Stock Exchange, London, gentleman, do hereby bargain, sell, assign, and transfer to the said Horace Barry five hundred shares, numbered 156735 to 157234 of and in the undertaking called the North British Australasian Company (Limited), To hold to the said Horace Barry, his executors, administrators, and assigns, subject to the same rules, orders, restrictions, and conditions that I held the same immediately before the execution hereof: And I the said Horace Barry do hereby agree to accept and take the said shares subject to the same rules, orders, restrictions, and conditions. Witness our hands and seals this 15th day of January, 1858.

"Robert Swan [L. S.]
"Horace Barry [L. S.]

"Signed, sealed, and delivered by the above-named Robert Swan in the presence of Caroline Bourne, Paris.

"Signed, sealed, and delivered by the above-named Horace Barry in the presence of C. V. Goode, Stock Exchange."

"Certificate of shares.

"The North British Australasian Company (Limited), Established, &c.

"No. 911. 700 shares.

"This is to certify that Robert Swan, of 4, Austin Friars, is the registered proprietor of seven hundred shares of 1*l.* each, fully paid up, *411] in the North British *Australasian Company (Limited), as appears by the books of the same, subject to the regulations of the company; which shares are numbered respectively 156735 to 157434. Given under the common seal of the company the 15th of September, 1857.

"Eustace Anderson } Directors.
"David Price }
"David Budge, Secretary.

"N. B. No transfer of any of these shares will be registered, unless accompanied by this certificate.

"The North British Australasian Company (Limited).
"Shares transferred from the certificate.

Date.	To whom transferred.	Number of shares.	Distinctive numbers.	
1858, Jan. 19.	Horace Barry	500	156735	157234
	To new certificate pro balance	200	157235	157434
		700		

That, on or about the 19th of January, 1858, the said shares were duly registered by the said company in the name of the said H. Barry as the proprietor thereof, and certificates were duly issued by the company to Barry that he was the registered proprietor of the same.

That, on or about the 14th of November, 1856, deponent received from Swan the following letter, which he believed to be in the handwriting of Swan:—"4, Austin Friars, November 13th, 1856. Sir,—Having left my late residence, Alnwick, Northumberland, I have to request that you will be good enough to alter my address in the books of your company to Robert Swan, care of W. L. Oliver, 4, Austin Friars, Old Broad Street."

That, previous to the said shares being so transferred *out of the name of Swan, and registered in the name of Barry, deponent sent by post a notice addressed to Swan, to the care of W. L. Oliver, Esq., 4, Austin Friars, being the last address of Swan registered by his direction in the books of the company, as follows,— [*412

"No. 911. The North British Australasian Company (Limited).

"27, New Broad Street, London.

"January 16th, 1858.

Sir,—I beg to inform you that a deed of transfer of 500 shares of this company from your name in favour of Horace Barry, has been lodged at the office for registration. The certificate accompanying the same represents 700 shares, numbered 156735 to 157434.

"The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction; and, failing your reply within the time mentioned, the transfer will be registered, and a new certificate issued to the purchaser."

That, previous to such transfer and registration, deponent never received, and to the best of his knowledge and belief the company never received, nor did any officer or director of the company ever receive any communication from Swan, or any person on his behalf, or any notice whatever that the said deed was not a genuine and valid deed of the said Robert Swan, or that the same had not been wholly filled up and completed as the same then was previous to its signature and execution by Swan, or that any part of the same was a forgery; nor to the best of the deponent's knowledge and belief had the company, or any officer or director thereof, any notice or knowledge whatever that any part of the said deed was a forgery, or that the same was not a genuine and valid deed, wholly *filled up and completed as the same now is, previous to its signature and execution by Swan. [*413

That, on the 9th of December, 1858, deponent received from Swan the following notice:—

"24, Northumberland Street, Strand. 9 Dec. 1858.

"Sir,—The under-mentioned shares, numbered 156735 to 157234, 157235 to 157434, 115204 to 115403, 177206 to 177305,—1000 in all,—having been transferred from my name in the books of the North British Australasian Company by means of fraud and forgery, which I have proved by having the thief and forger convicted on his own confession, I hereby give you notice of the fact, and request that the same may be restored, so that I may be put in my original position, and

entitled to all the rights and privileges of a proprietor of the said above-mentioned shares numbered as aforesaid."

That the said transfer deed was registered as aforesaid in the ordinary course of the business of the said company, and after the usual notice of such transfer being about to be made had been given to Swan, and without any means of knowledge on the part of the company that the said deed was not a genuine and valid transfer by Swan, or that Barry was not legally entitled to compel them to register the said transfer of the said shares in the books of the said company.

That, of the above-mentioned shares, those numbered from 156735 to (156754) now stand on the register of shareholders of the company in the name of Thomas Haines, who acquired the same by a deed of transfer from Richard Walker, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last-men-
*414] tioned shares, and from time to time issued to *them respectively certificates of their being the registered proprietors of the said last-mentioned shares.

That, of the above-mentioned shares, those numbered 156735 to 156804 now stated on the register of shareholders in the name of Johann Frederick Fredericksen, who acquired the same by a deed of transfer from William M'Kewan and James Gray, who acquired the same by a deed of transfer from James Pickering, who acquired the same by deed of transfer from Richard Walker aforesaid, who acquired the same by deed of transfer from Barry; and that the said company in the ordinary course of business and from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 156805 to 157004 now stand on the said register of shareholders in the name of James Punch, who acquired the same by deed of transfer from Barry; and that the said company in the ordinary course of business from time to time duly registered the said James Punch as the proprietor of the said last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157005 to 157104 now stand on the register of shareholders in the name of Scarlett Lloyd Parry, who acquired the same by a deed of transfer from John Dunkin Lee, who acquired the same by deed of transfer from Barry; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the said last-mentioned shares.

*415] *That, of the above-mentioned shares, those numbered from 157105 to 157134 now stand on the register of shareholders in the name of Margaret Ann Lever, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business duly registered the said Margaret Ann Lever as the proprietor of the said last-mentioned shares, and issued to her a certificate of her being the registered proprietor of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157135 to 157184 now stand on the register of shareholders in the name of Bryan Ward Gibbins, who acquired the same by a deed of transfer from Joseph Pattison Webb, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business from time to time duly registered the said persons in this paragraph mentioned respectively as the proprietors of the last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157185 to 157204 now stand on the register of shareholders in the name of Martha M'Auliffe, who acquired the same by a deed of transfer from Thomas Tichmarch, who acquired the same by a deed of transfer from Barry; and that the company in the ordinary course of business duly registered the said persons in this paragraph mentioned respectively as the proprietors of the said last-mentioned shares, and from time to time issued to them respectively certificates of their being the registered proprietors of the said last-mentioned shares.

That, of the above-mentioned shares, those numbered from 157205 to 157234 now stand on the register of shareholders in the name of Charles Wellington Howell, who acquired the same by deed of transfer *from Barry; and that the company in the ordinary course of business duly registered the said C. W. Howell as the proprietor [*416 of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor of the last-mentioned shares.

That, on or about the 26th of July, 1858, deponent received a transfer deed dated the 23d of July, 1858 (in the same form and similarly attested to that set out antè, p. 410), purporting to be a transfer from Swan to William M'Kewan and James Gray of 500 shares, numbered 157235 to 157434, 115204 to 115403, and 177206 to 177305, together with the certificate of the shares therein mentioned, and a request from M'Kewan and Gray that the same should be registered by the company in their names.

That, on or about the 2d of August, 1858, the said shares were duly registered by the company in the names of M'Kewan and Gray as the proprietors thereof, and certificates were duly issued by the company to them that they were the registered proprietors of the same.

That, previous to the said shares being so transferred out of the name of Swan and registered in the names of M'Kewan and Gray, deponent sent by post a notice addressed to Swan, to the care of W. L. Oliver, Esq., of 4, Austin Friars, being the last address of Swan registered by his direction in the books of the company, in the same form as the notice set out antè, p. 412, informing him of the intended transfer of the last-mentioned shares.

That, previous to such transfer and registration, deponent never received, and to the best of his knowledge and belief the company never received, nor did any officer or director of the company ever receive any communication from Swan or any person on his behalf, or any notice whatever, that the said deed was not a *genuine and [*417 valid deed of Swan, or that the same had not been wholly filled up and completed as the same now is previous to its signature and execution by Swan, or that any part of the same was a forgery; nor had

the deponent, nor to the best of his knowledge and belief had the company or any officer or director thereof any notice or knowledge whatever that any part of the said deed was a forgery, or that the same was not a genuine and valid deed, wholly filled up and completed as the same now is previous to its signature and execution by Swan.

That the said transfer deed was registered as aforesaid in the course of the business of the company and after the usual notice of such transfer being about to be made had been given to Swan, and without any means of knowledge on the part of the company that the said deed was not a genuine and valid transfer by Swan, or that M'Kewan and Gray were not legally entitled to compel them to register the said transfer of the said shares in the books of the company.

That, of the above-mentioned shares, those numbered 157235 to 157314 now stand on the register of shareholders in the name of Johann Frederick Fredericksen aforesaid, who acquired the same by a deed of transfer from M'Kewan and Gray; and that the company in the ordinary course of business duly registered the said Johann F. Fredericksen as the proprietor of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor thereof.

And that, of the above-mentioned shares, those numbered 157315 to 157434, 115204 to 115403, and 177206 to 177305, now stand on the said register in the name of Isaac Tracey, jun., who acquired the same by a deed of transfer from M'Kewan and Gray; and the company in the ordinary course of business duly registered the said Isaac Tracey,
*418] jun., as the *proprietor of the last-mentioned shares, and issued to him a certificate of his being the registered proprietor thereof.

The affidavit of M'Kewan and Gray stated, that, on or about the 23d of July, 1858, they, for and on behalf of the London and County Banking Company, became and were the bonâ fide purchasers for value of 500 shares in the North British Australasian Company, and that the same were transferred to them under and by virtue of the deed of transfer referred to in Budge's affidavit (antè, p. 416); that, at the time when the said deed was first produced and shown to the deponents, and when they first received the same, the said deed was filled up with the numbers and descriptions of the said shares, and with the deponent's names as the purchasers thereof, in the same manner, and was in precisely the same form and condition as the same now is; that the deponents then bonâ fide paid for the said shares for and on behalf of the said banking company the sum of 300*l.*; that deponents purchased the said shares and took and received the said deed of transfer in the ordinary course of business, and without any knowledge or notice whatever that the said deed was not a true and valid deed; that deponents took and received the said deed with a full and bonâ fide belief that the deed was a true and valid transfer of the said shares, and that the same had been and was duly executed by Swan; and that, on or about the 2d of August, 1858, and before deponents had any knowledge or notice whatever that the said deed was a forgery, or that the same was not a true and valid deed, deponents procured the said transfer to be duly registered in the books of the said North British Australasian Company.

Barry's affidavit stated that, on or about the 15th of November, 1858,
*419] he became the bonâ fide purchaser *for value of 500 shares in the North British Australasian Company, and that the same

were transferred to him under and by virtue of the deed of transfer referred to in Budge's affidavit (antè, p. 410); that, at the time when the deed was first produced and shown to him, and when he first received the same, the said deed was filled up with the numbers and descriptions of the said shares, and with his name as the purchaser thereof, in the same manner and in precisely the same form and condition as the same now is; that deponent then bonâ fide paid for the said shares the sum of 375*l.*; that he purchased the said shares and took the said deed of transfer in the ordinary course of business, and without any knowledge or notice whatever that the said deed was not a true and valid deed; that he took and received the said deed with the full and bonâ fide belief that the said deed was a true and valid transfer of the said shares, and that the same had been and was duly executed by Swan; and that, on or about the 19th of January, 1858, and before deponent had any knowledge or notice whatever that the said deed was a forgery, or that the same was not a true and valid deed, he procured the said transfer to be duly registered in the books of the said company.

The case was twice argued,—the first time before Erle, C. J., Williams, J., Crowder, J., and Byles, J., and the second time before Erle, C. J., Williams, J., Willes, J., and Keating, J,—cause being shown against the rule by *Hawkins*, Q. C., and *Holl*, for the company, and by *Petersdorff*, Serjt., and *Rew*, for the several parties called upon by the amended rule: and *Knowles*, Q. C., and *Hurlstone*, being heard in support of it.

Argument in opposition to the rule.—The shares in question were transferred from Swan's name in the *books of the company, in the usual course of business, after due notice had been sent to Swan at the place he himself had caused to be registered as his address, and in the bonâ fide belief on the part of the transferrees and of the company's officers that the transaction was in all respects regular. [ERLE, C. J.—I think we may assume that the notice never reached the hands of Swan. The question is, which of two innocent parties is to suffer from the fraud of Oliver.] The company were guilty of no negligence; neither were the transferrees of these shares: but both were misled by the gross negligence of Swan, who, trusting blindly to Oliver, his broker, by attaching his signature to blank transfers, and intrusting them to Oliver, enabled that person to impose upon the company and upon the purchasers. The circumstance of the signature of Caroline Bourne being a forgery, it is submitted, makes no difference. The statute does not require any attesting witness; it is only the form annexed to the rules and regulations of the company that makes attestation necessary, and that is only for the protection of the company. [CROWDER, J.—The company would not have acted upon the transfer deed without an attesting witness.] Probably not. Although as between Swan and Oliver the transfer deeds would be null and void, there are numerous authorities to show that the former would be estopped from setting up his right as against a bonâ fide purchaser for value. In Young *v.* Grote, 4 Bingh. 253 (E. C. L. R. vol. 13), 12 J. B. Moore 484 (E. C. L. R. vol. 22), a customer of a banker delivered to his wife certain printed checks signed by himself, but with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business. She caused one to be filled up with the words "fifty pounds [*420

two shillings," the words "fifty" being commenced with a small letter and placed in the middle of a line, and the figures 50 *and 2 being also placed at a considerable distance from the printed £.: in this state she delivered the check to her husband's clerk to receive the amount, whereupon he inserted at the beginning of the line in which the word "fifty" was written the words "three hundred and," and the figure 3 between the £ and the 50. The bankers having paid the 350*l.* 2*s.*, it was held that the loss must fall on the customer. Best, C. J., in giving judgment, says: "Undoubtedly, a banker who pays a forged check is in general bound to pay the amount again to his customer, because in the first instance he pays without authority. But, though that rule be perfectly well established, yet, if it be the fault of the customer that the banker pays more than he ought, he cannot be called on to pay again. That principle has been well illustrated by Pothier, in commenting on the case put by Scacchia, 'Cependant, si c'etait *par la faute du tireur* que le banquier eut été induit en erreur, le tireur n'ayant pas eu le soin d'ecrire sa lettre de maniere à prevenir les falsifications; puta, s'il avait écrit en chiffres la somme tirée par la lettre, et qu'on eut ajouté zero, le tireur serait en ce cas tenu d'indemniser le banquier de ce qu'il a souffert de la falsification de la lettre, à laquelle le tireur par sa faute a donné lien; et c'est à ce ca qu'on doit restreindre la decision de Scacchia.'" Tayler *v.* The Great Indian Peninsular Railway Company, 28 Law J., Ch. 285, is a strong authority in favour of the company. There, T. being the holder of certain shares in a company upon which 20*l.* each had been paid up, and being also entitled to other shares in the same company upon which 2*l.* each had been paid, instructed his brother to sell the 2*l.* shares. The broker sold the 20*l.* shares, and brought to T. for execution by him deeds of transfer in which blanks were left for the name of the transferree and for the number and *the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 20*l.* shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 20*l.* shares, which had been fraudulently obtained by the broker, to bonâ fide purchasers, who filled up the blanks. Upon a bill filed by T., it was held that the deeds of transfer were void, and that he was entitled to the shares expressed to be transferred thereby, and to have his name restored to the register. The ground upon which Vice-Chancellor Wood proceeded in that case was, that the company had been guilty of great negligence in taking a transfer in a form which was illegal: but he fully acceded to the doctrine laid down by Ashhurst, J., in Lickbarrow *v.* Mason, 2 T. R. 63, 70, that "whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." And that decision was confirmed by the Lords Justices, on appeal: see 28 Law J., Ch. 709. In Coles *v.* The Bank of England, 10 Ad. & E. 437 (E. C. L. R. vol. 37), 2 P. & D. 521, in case by the executors of a stockholder against the Bank of England for refusing to transfer stock of the testatrix, and to pay the dividends, it appeared that nearly all the stock had been sold and transferred in the lifetime of the testatrix by her nephew C., who had brought another woman to personate her and forge her signature. After the sale, the testatrix had repeatedly received the warrants for the reduced dividends

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in person, and had signed the warrants and the bank-books, being on those occasions accompanied by C., who mentioned the amount of dividend in her presence. The jury found that the testatrix had the means of knowing of the transfer, but that there was no evidence of actual knowledge; that she had been guilty of gross negligence; and that there had been no *negligence on the part of the defendants. [*423
It was held that these facts afforded a defence on the plea of not guilty. The case of The Sheffield, Ashton-under-Lyne, and Manchester Railway Company *v.* Woodcock, 2 Railw. Cas. 522, 7 M. & W. 574,† cited by the Lord Chancellor in Re The North of England Joint Stock Banking Company, 16 Jurist 435, 440, also supports this view. [WILLIAMS, J.—That went upon ratification. CROWDER, J., referred to the opinion of the judges delivered by Parke, B., in The Bank of Ireland *v.* The Trustees of Evans's Charity, 5 House of Lords Cases 389.] A person by giving another a blank acceptance makes him as to third parties his general agent to fill up the bill to the extent the stamp will cover, and he is bound by his acceptance in the hands of an innocent holder for value: Montague *v.* Perkins, 22 Law J., C. P. 187, 17 Jurist 557. Upon the whole, it is submitted that the court will not under the circumstances exercise the authority conferred upon it by these acts of parliament, but will leave Mr. Swan to any remedy he may have by the ordinary course of proceedings at law or in equity, when the matter might if necessary be reviewed by a court of error. If the court were to make this rule absolute, it would be dealing with the rights and interests of persons not now before it,—the intermediate transferrees, who are not called upon by the rule. [ERLE, C. J.—I certainly entertain a strong objection to trying on a summary application like this a matter which the parties have the means of trying in a much more satisfactory manner by the ordinarily constituted tribunals. WILLIAMS, J.—Is there any mode of proceeding, either at law or in equity, whereby the same remedy may be had as is sought here?] Swan might have a mandamus to the company to restore his name to the register,—Norris *v.* The Irish Land Company, 8 Ellis & B. 512 (E. C. L. R. vol 92); or he might file a bill in *Chancery, and so bring all the parties [*424
before the court, as in Tayler *v.* The Great Indian Peninsular Railway Company; or he might have an action at law against the company for wrongfully taking his name off the register,—Daly *v.* Thompson, 10 M. & W. 309;† or an action for the dividends,—Dalton *v.* The Midland Railway Company, 12 C. B. 458 (E. C. L. R. vol. 74), 13 C. B. 474 (E. C. L. R. vol. 76). In Sloman *v.* The Bank of England, 14 Simons 475, where one of two trustees of a sum of stock sold it out under a power of attorney to which he had forged the signature of his co-trustee, and some time afterwards absconded,—it was held that the Bank of England was compellable in a court of equity to re-invest the stock in the name of the other trustee. There is nothing in the 9th section of the 20 & 21 Vict. c. 14 to make it obligatory on the court to interfere in the manner prayed by this rule. Undoubtedly, there are many cases where the enabling words of a statute have been held to be obligatory. Most of these are collected in Macdougall *v.* Paterson, 11 C. B. 755 (E. C. L. R. vol. 73): but there is an authority in point upon the 25th section of the 19 & 20 Vict. c. 47, viz. the case of The British Sugar Refining Company, 3 Kay & J. 408, where it was held that the

section, enabling a shareholder whose name is without sufficient cause omitted to be entered in the company's register to apply by motion for an order that the register may be rectified, was not meant to give to every shareholder ex debito justitiæ this summary remedy. The object of that section was, to enable the court to avoid the inconvenience and injustice which occasionally arise from capricious or frivolous objections on the part of companies to complete the registration of their shareholders. It was not intended by the act, that, in the event of there being a serious question to be tried, the matter should be disposed of
*425] summarily. [WILLIAMS, J.—The language of the second *act is larger.] A summary jurisdiction is conferred upon this court by the Railway Traffic Act, 1854, 17 & 18 Vict. c. 31, the language of which is imperative: but that act applies to cases for which there was no existing remedy; and the most extensive powers are given for investigating the facts and ascertaining the rights of the parties: whereas none such are given by the acts now under consideration.

Argument in support of the rule.—The court undoubtedly has power under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, ss. 8, 9, to grant the relief prayed by this rule, and, if a proper case is made out, is bound to exercise it: and there can be no need for the interference of a court of equity, when the same measure of justice may be meted out here under the statutes. Upon the facts disclosed by the affidavits, it is submitted that there has been no valid transfer of the shares in question, and consequently that Swan remains the legal owner of them. The company have by means of a forgery been induced to remove Swan's name from the register: but that act of the company, to which he was no party, cannot vary Swan's rights. The case differs in no respect from that of a forged bill or a forged transfer of government or bank stock: the forgery does not alter the position of the party whose name has been so improperly used; the stock still remains the property of the original holder. The cases relied upon on the other side are all founded upon the doctrine of Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 Nev. & P. 488, where Lord Denman, delivering the judgment of the court, says,—"The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is
*426] *concluded from averring against the latter a different state of things as existing at the same time." But in no case has it been held that a person whose signature to a transfer has been forged ceases to be the legal owner of the stock. Mr. Swan's legal title to these shares being clear, what has he done to dispossess himself of them? It is said that he was guilty of negligence in placing blank transfers in the hands of Oliver. But it is the well-known practice of the Stock Exchange to execute transfers in blank; therefore, there was no negligence in that. Besides, Oliver could not avail himself of the transfer without forging the signature of an attesting witness. Young *v.* Grote, 4 Bingh. 253 (E. C. L. R. vol. 13), 12 J. B. Moore 484 (E. C. L. R. vol. 22), has been much relied on. There, however, the plaintiff's agent, by her negligent manner of filling up the check, afforded the clerk an opportunity of committing the forgery which imposed upon the bankers. Vice-Chancellor Wood, observing upon that case in Tayler *v.*

The Great Indian Peninsular Railway Company, 28 Law J., Ch. 289, says: "In that case, the alteration was made in such a manner that no person using due and ordinary diligence could have discovered that it had been made improperly." And there, as the learned judge remarks, the decision proceeded partly on the ground of negligence, and partly, by analogy to the doctrine applicable to bills of exchange, on the ground that the banker was bound to pay to the order of his customer. The doctrine of Ashhurst, J., in Lickbarrow *v.* Mason, 2 T. R. 63, 70, that, "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it," was also relied on. But the facts there were altogether different from and can have no application to those of this case. In Coles *v.* The Bank of England, 10 Ad. & E. 437 (E. C. L. R. vol. 37), 2 P. & D. 521, there was clear proof that the testatrix allowed the diminished *dividends to be paid with full [*427 knowledge or means of knowledge of the fraud. In the case of The Sheffield, Ashton-under-Lyne, and Manchester Railway Company *v.* Woodcock, 7 M. & W. 574,† the court only carried out the intention of the parties: the transferror meant that the transfer should be an operative instrument. Assuming that Swan *had* been guilty of some degree of negligence, that clearly would not divest his legal title to these shares. At all events, as to the 500 shares which the company allowed to be transferred after Oliver's conviction, and after they had full notice of the forgery and fraud, they cannot have a shadow of equity. For these the transferees would clearly have a remedy against the London and County Bank, who sold them with full knowledge of the taint upon them. The 25th section of the 19 & 20 Vict. c. 47 was intended to give authority to the court to do that which could not conveniently be done in any other way. In the case of The British Sugar Refining Company, 3 Kay & J. 408, which came before Vice-Chancellor Wood shortly after the passing of that act, his Honour refused to decide upon the question of title; and thereupon the provision in the 20 & 21 Vict. c. 14, was passed expressly to enable the court to inquire into the title. The word "may" is one which is either directory or compulsory, according to circumstances. The true principle is, that, where an authority is given to the court by that word, the court is bound to exercise the authority where a proper case is made for it; or, as Jervis, C. J., expresses it in Macdougall *v.* Paterson, 11 C. B. 755, 773 (E. C. L. R. vol. 73), "when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having the right to make the application." And this is no new doctrine; *for in Rex et Regina *v.* Barlow, 2 [*428 Salk. 609, upon an indictment on 14 Car. 2, c. 12, against churchwardens and overseers for not making a rate to reimburse the constables, exception was taken that the statute only puts it in their *power* to do so by the word *may*, &c., but does not *require* the doing of it as a *duty* for the omission of which they are punishable. Sed non allocation; for, where a statute directs the doing of a thing for the sake of justice or the public good, the word *may* is the same as the word *shall:* thus, the 23 H. 6 says the sheriff *may* take bail; this is construed *shall*, for he is compellable to do so. So, in The Queen *v.* The

Tithe Commissioners for England and Wales, in the Matter of Great Hale Tithes, 14 Q. B. 459 (E. C. L. R. vol. 68), Coleridge, J., in delivering the judgment of the court, says,—"Upon the construction of the 7th section of the 5 & 6 Vict. c. 54, we are of opinion, that, in the cases to which it applies, the tithe-commissioners are bound to act under it, and must confirm according to its provisions. The words undoubtedly are only empowering; but it has been so often decided as to have become an axiom, that, in public statutes, words only directory, permissory, or enabling, may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." It becomes, therefore, the imperative duty of the court to grant the relief prayed under this statute the moment it becomes apparent to it that the name of a person having an unimpeachable legal title to shares has been improperly omitted or erased from the register. If the court decline to interfere under the statute, the party will be practically without remedy. He clearly has no *legal* redress against the now shareholders. It is said that he may file a bill in equity. But, against whom? The first transferee, the present holder of the shares, or the company? As
*429] against the two former, how could *it be said that the plaintiff has a better equity than the defendant, who has in ignorance of the fraud parted with his money? [WILLES, J.—The same jurisdiction is given by the statute to the courts of law and equity. The court of equity usually considers the title of a bonâ fide purchaser for value without notice unassailable. Can a court of law pronounce a decision different from that which a court of equity would pronounce, under an authority conferred upon both by the same words in the same section of an act of parliament? WILLIAMS, J.—I do not think this statute meant to alter the law, or to give any new right.] To restore Swan's name to the register would be effecting no alteration of the legal rights of the parties. [ERLE, C. J.—If we were to decide upon this application in favour of Mr. Swan, we should be conclusively determining the title to these shares. WILLIAMS, J.—The question which presses me is, whether the rights of the parties might not be ascertained by some mode of proceeding in which an appeal would lie.] The court might, if so advised, direct a special case or an issue to inform its conscience as to the rights of the several parties. But, if any recourse is to be had to a court of equity, it is for the other parties to proceed there, and not Mr. Swan. *Cur. adv. vult.*

The court being equally divided, their judgments were on a subsequent day delivered seriatim, as follows:—

ERLE, C. J.—This was a motion on behalf of Mr. Robert Swan for an order to the North British Australasian Company to rectify their register of shareholders, by restoring his name, under the 19 & 20 Vict. c. 47, s. 25, and the 20 & 21 Vict. c. 14, ss. 8, 9. The facts were, that Swan had purchased 1000 shares in the company in 1857, and was duly
*430] registered, *and deposited the certificates in a box in a bank, and had never intended to transfer them. In October, 1858, he discovered that the certificates had been stolen, and as to 500 of the shares Barry had been registered as transferee of Swan in January, 1858, and as to the other 500 shares M'Kewan and Gray were registered as transferees. For each of these transfers there was a deed in the proper form purporting to be duly executed by Robert Swan, and

to be attested by Caroline Bourne; and the transferees in each case took the transfers bonâ fide for value. These shares had been afterwards transferred again bonâ fide for value; but I take the case as if it had arisen between Mr. Swan and the first transferees.

Mr. Swan states that he never executed or gave authority for executing any deed of transfer of these shares, and so had a primâ facie case: but it appeared further that he had employed one Oliver as his broker in the purchase and sale of shares for several years, and, among others, in the purchase of the shares in question; and that, having occasion to sell some Manchester and Lincoln shares and some Scottish Australian Investment shares, he had signed and sealed and delivered to Oliver blank forms of transfer, to be completed by him for the transfer of these last-mentioned shares; that for such transfers six forms only were necessary, but Oliver induced him to give, and he did deliver to Oliver, eight forms so signed and sealed. Oliver used six of these forms for the transfers according to the order of Swan, and used the remaining two forms for the transfer of the two sets of 500 shares now in dispute, without any order or authority from Swan; and this raises the question whether Mr. Swan has a right to an order to restore his name to the register as the holder of these shares.

Upon the first statute, Wood, V. C., was of opinion *that the legislature intended to give a summary remedy where companies [*431 from frivolous or capricious objections refused to complete the register, and did not intend to give every claimant a right, ex debito justitiæ, to try a serious question of right by motion on affidavit: In re The British Sugar Refining Company, 3 K. & J. 408. But the subsequent statute has enacted, that, on a motion to rectify the register, the court may decide the title to the shares, if it arises incidentally; and that is the case here.

Now, although the deeds of transfer, as between Swan and Oliver, were null and void, yet, as between Swan and a purchaser for value on the faith that they were valid, they may be valid to pass the property, if not directly, yet indirectly, by estopping Swan from setting up his right against such purchaser. The authorities for the application of this principle in respect of negotiable instruments are numerous. The giver of a blank acceptance or an endorsement on a blank note filled up for a larger sum than he authorized, is estopped, as against a bonâ fide holder, from setting up any other limit of authority than the amount which the stamp will bear: Russell *v.* Langstaff, 2 Dougl. 514; Russell *v.* Perkins, 25 Law J. C. P. 187. In Young *v.* Grote, 4 Bing. 253 (E. C. L. R. vol. 13), 12 J. B. Moore 484 (E. C. L. R. vol. 22), the plaintiff left checks signed in blank with his wife, to be filled up according to need: she filled up one so imperfectly as to enable the bearer to alter the 50*l.* for which it was given into 350*l.*: and it was held that the plaintiff was estopped from setting up against the defendant, who had acted with ordinary caution in paying the check in the usual course of banking business, that his agent had only drawn the check for 50*l.*, inasmuch as it was his negligence, by his agent, that enabled the fraudulent holder to cheat the banker. These decisions relate to negotiable *instruments: and the question arises more frequently in respect [*432 of such instruments, because they are more frequently given in blank, to be filled up by agents: but I am of opinion that the principle

on which they rest is entirely independent of negotiability: it has no relation to passing of property by delivery, which is negotiability; it relates to validating, as against bonâ fide purchasers, that which, according to Minter Hart's Case, 7 C. & P. 652 (E. C. L. R. vol. 32), 1 M. C. C. R. 486, as against the agent, is a forgery; and the law for negotiability never affects the validity of a forgery. The principal, whose negligence has enabled his agent to cheat a third party acting with ordinary caution, is universally estopped from denying the authority of the agent. A retired partner, who has given no notice of dissolution to a customer, is estopped from denying the authority of the continuing partner to bind him with that customer. A master who has accredited a servant to a tradesman to order goods in his name, and has recalled the authority from the servant without giving notice to the tradesman, is estopped from denying the authority of the servant to bind him with such tradesman. I am further of opinion that the same principle applies to instruments under seal.

In Texira *v.* Evans, which was cited by Wilson, J., in Master *v.* Miller, 1 Anstr. 225, 228, Evans gave a bond executed in blank to his broker, to raise thereon as much money as he could get. Texira consented to lend 200*l.*, and the broker filled in his name and the sum. In an action by Texira on this bond, Evans pleaded non est factum; and, as against Texira, Lord Mansfield held it to be a valid bond. Though the facts are shortly stated, and it was a ruling at Nisi Prius, still, as far as appears, Texira was a bonâ fide holder for value paid to Evans. Therefore, it was not the ordinary question which of two innocent parties *should suffer by the fraud of a third; but a direct claim by the defendant that the law should support his fraud, and, instead of making the debtor pay his debt, make the creditor pay to the debtor his costs. If these are the facts, Lord Mansfield was entirely right in holding that the defendant should not set up the alteration as against this plaintiff.

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Where an agent intrusted with the custody of the seal of a corporation, applied it without authority to a power of attorney for selling out stock, and obtained the proceeds, and the question was who should lose by the fraud of this agent, the Irish judge directed the jury to find for the defendant if they thought the plaintiffs by their negligence had contributed to the loss. Upon bill of exceptions, this was held wrong by the House of Lords, because the negligence, if any, of intrusting the custody of the seal was not so proximately connected with the loss as was thought necessary. Lord Cranworth, in giving judgment, explains the case of Young *v.* Grote, by the estoppel of a principal from denying his authority to an agent, where his negligence has enabled the agent to cheat a person acting with ordinary caution. In Ireland and in the House of Lords this rule of law was treated as applicable to deeds as well as to negotiable instruments: and the judgment of the House of Lords, holding that the negligence was not proximate, by implication holds, that, if it had been so, between these parties the false deed would have been valid: The Bank of Ireland *v.* Evans's Charities, 5 House of Lords Cases 389, 413.

Where the transfer of shares was executed with a blank for the purchaser's name, by a proprietor who was not registered, and the purchaser delivered to the company a proxy-paper purporting to be by a proprie-

tor, such purchaser was estopped from setting up against the company, in an action for calls, that the *transfer was void. Parke, B., [*434 says the defendant held out false colours to induce the company to register him as a proprietor, and therefore to bring this action against him. It is an universal rule of law, that, where a party makes a representation to another whereby the situation of the latter is altered, he is bound thereby: The Sheffield and Manchester Railway Company *v.* Woodcock, 7 M. & W. 574.† This is the general principle which in various forms pervades all the cases here cited, and the very numerous class often referred to with the case of Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 Nev. & P. 488.

Where the plaintiff tendered to the defendant transfers executed in blank, in performance of his contract to deliver valid transfers, and sued the defendant for not accepting and paying for them as valid transfers, the judgment was for the defendant, and rightly so; for, between these parties, there had been no deception, and no ground for applying the doctrine of estoppel: Hibblewhite *v.* M'Morine, 6 M. & W. 200:† and it should be noted that the same court afterwards held the transfer valid by estoppel, in the action for calls against Woodcock: 7 M. & W. 574.†

Where the plaintiff had delivered to his broker transfers executed in blank, with authority to fill them up for 2*l.* shares, and he sold and delivered them, still being blank, to another broker, to be filled up for 20*l.* shares, and with the purchaser's name when they should sell, Wood, V. C., granted relief to the plaintiff, and decided that he was still proprietor of the 20*l.* shares; and this judgment that the transfers executed in blank and misapplied by the broker did not bind the principal, is in entire consistence with the cases I have cited, because the party who claims to benefit by this doctrine of estoppel must show that he has acted in the transaction where he was deceived with ordinary *caution; and the Vice-Chancellor held that a broker taking transfers blank as to names and sums did not act with ordinary caution, but paid his money for transfers which he knew to be void: Tayler *v.* The Great Indian Peninsular Railw. Company, 28 Law J., Ch. 285. This view is entirely confirmed by the judgment of Lord Justice Turner, in the same case on appeal, who sanctions the doctrine of estoppel as here explained, but declares it has no application in the case before him, for the reason above assigned: 28 Law J., Ch. 710. [*435

This doctrine of estoppel to validate some void transfers seems essential; otherwise, a seller of shares might by these means receive the purchase-money, and recover back the shares if their value should rise or he should wish to rescind. The doctrine, limited to throwing the loss from the party who has acted with due care to the party who has caused the loss by wilful imprudence, must always operate to promote the substantial interest of commerce, without introducing any pernicious uncertainty that I can discover; and the doctrine, as I have stated, seems to me to reconcile all the cases.

Then, did Swan by his negligence enable Oliver to cheat Barry by the transfers in question? I think the answer must be in the affirmative. According to the 5th and 11th regulations of the company here in question, the holder of a share may transfer it, and the transferee may accept it, by a deed of transfer in the form approved of by the directors. The transfers executed in blank by Swan, and intrusted by him to Oliver to

fill up, were in the form approved of by the directors; and they alone if valid would have passed the property. Swan gave to Oliver the number of transfers that he asked for, and took no care, by inquiry, or examination of the register, or in any way, to see how they had been used. He put them into his *hands, not only to be filled up, but to be attested, although the filling up of a deed by an agent not authorized by deed would be void, and although the attestation must be signed by a witness who could not truly attest. Furthermore, although the certificates were locked in a box at the bank, yet Swan, as I gather, trusted the key to Oliver to get the shares that were to be transferred, and at the same time, or by the same key, he probably had an opportunity to take the certificates of the other shares now in question. In this I think Swan was guilty, not only of the negligence of an extreme trust in Oliver, but also of misconduct in planning that Oliver should issue transfers as valid which were neither properly executed nor attested. This negligence and misconduct were as proximately connected with the cheat by Oliver as the wrongful filling up of a blank acceptance is with the attempted cheat on the holder.

*436]

Then, did the third party show ordinary care in paying for these transfers? They were received from an established broker fully accredited by Swan. They were signed, sealed, and attested exactly the same as those which Swan intended to pass as valid, in respect of which he had received the purchase-money. Swan intended that a purchaser might properly receive and pay for them; and he cannot say that there was any apparent difference between them and the transfers now in dispute.

As to one set of transfers, Swan says he authorized them; as to the other, he says he did not: but that is a matter which the purchaser could by no examination of the documents of title discover. Neither, as it seems to me, was it want of ordinary care not to go to the attesting witness to inquire about the execution. There is no evidence of such a precaution being common.

*It is objected that the certificates were stolen, and that no property in them could be acquired from the thief. The answer is, that the certificates were neither the share nor the title to the share: they are an indication of title which the purchaser with ordinary care would inquire for. In this case he did so, and Oliver produced them: and it is probable, as above observed, that Swan by his careless trust gave him the opportunity of taking them.

*437]

For these reasons, between these parties, I have come to the conclusion that Mr. Swan has not proved his title to the shares in question. I fully agree with my Brother Keating that on the ground taken by us the rule should be discharged.

KEATING, J.—In this case Mr. Robert Swan obtained a rule calling upon The North British Australasian Company, Limited, and others, registered holders of shares formerly standing in his name, to show cause why the register of shareholders in the said company should not be rectified by replacing the name of the said Robert Swan thereon, as it had originally stood, and why the said company should not pay the costs of the application.

The application was made under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, s. 9: and it appeared by the affidavits that Mr. Swan had for some years previous and up to 1858, employed as his

stockbroker, in the purchase of shares, a person named Oliver, with whom also he was on terms of private intimacy and friendship. In 1857, he had purchased 1000 shares in the North British Australasian Company, and deposited the certificates for these shares, with other securities of a similar nature, in a box, which Oliver on his behalf deposited for safe custody at the London and County Bank. On two occasions, before January, *1858, Mr. Swan had employed [*438 Oliver to sell for him shares in the Manchester, Sheffield, and Lincoln Railway Company, and in the Scottish Australian Investment Company, and on each occasion sent him for that purpose blank forms of transfer, signed and sealed, to be filled up by Oliver on such sales. It does not appear that any of these forms (eight in number) were attested, although each contained a printed attestation form. Six of the forms were filled up and used by Oliver for the sales of the shares as directed by Mr. Swan, but the remaining two forms, which he had represented as being necessary for those sales, he filled up and used for the transfer of the North British Australasian shares, 500 in January, 1858, to Barry, and 500 in July, 1858, to M'Kewan and Gray, the purchasers in both cases taking them bonâ fide, for value, in the usual course of business, without any notice whatever of the fraud, and the transfers being complete on the face of them at the time of the sales. How the blank attestation had been filled up by Oliver for the purpose of the authorized sales does not appear; but, in the transfers upon the sales in question, he had inserted, as attesting witness, but without her authority, the name of Caroline Bourne, who was a friend of Robert Swan, and then living at Paris, where he also then resided. The certificates of the 1000 shares Oliver had obtained by feloniously abstracting them from the box in which they were deposited, by means of a duplicate key which without the authority of Mr. Swan he had retained in his possession. Whether the certificates for the shares previously transferred had been in the same box, or, if so, how they had been obtained, does not appear.

The purchasers of the Australasian shares took the deeds to the offices of the company for the purpose of *being registered, but [*439 the company, before doing so, sent in each case a notice of the intended transfer to Mr. Swan, addressed "To the care of Mr. Oliver, No. 4, Austin Friars," that being the address which was last registered by Mr. Swan's direction as his address. These notices were of course intercepted by Oliver, and the company, not receiving any countermand, registered the transfers in the usual course.

In August, 1858, Mr. Swan authorized the transfer of the shares in question by means of a blank transfer sent by him for that purpose to Oliver, upon a false representation by the latter that he could dispose of them advantageously, his object being to prevent Mr. Swan discovering that they had been already sold; and it was not until the 9th of October, that, Oliver being charged with frauds upon other persons, Mr. Swan first discovered that his Australasian shares had been fraudulently disposed of. He then prosecuted Oliver, who pleaded guilty to an indictment charging him as a bailee with the felonious conversion of the shares. An application was afterwards made by Swan to the company to restore his name to the register as holder of the 1000 shares. Upon their declining to do so, the present rule was obtained: and the

question is, how far upon these facts Mr. Swan can claim the interposition of this court to rectify the register in the manner prayed.

By the 25th section of the 19 & 20 Vict. c. 47, the court may, at the instance of a shareholder, omitted from the register "without sufficient cause" and "if satisfied of the justice of the case," make an order for the rectification of the register, and the 9th section of the 20 & 21 Vict. c. 14, gives the court power to decide on any question relating to title, or, generally, "any question that it may be necessary or expedient to decide," for the purpose of so rectifying the register.

*440] *In the well known case of Lickbarrow *v.* Mason, 2 T. R. 63, Mr. Justice Ashhurst says, "We may lay it down as a broad general principle, that whenever one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must bear it." This principle, in itself so just, has been applied in many instances in our common law courts, where negligence has occasioned the loss, although, in its application, it has been more or less modified by circumstances.

The cases in which an innocent holder has been allowed to recover upon a bill of exchange, which, having been accepted in blank, had been filled up with an amount larger than the sum authorized, or which had been lost and fraudulently circulated, all contain the principle referred to, although strengthened by considerations of policy with regard to the nature of the instruments as part of the circulating medium of the country. The case of Young *v.* Grote, 4 Bingh. 253 (E. C. L. R. vol. 13), 12 J. B. Moore 484 (E. C. L. R. vol. 22), also illustrates the same principle; there, a check drawn so as to admit easily of an alteration in the sum from 50*l.* to 350*l.* having been fraudulently altered in that way, and paid to the larger amount, it was held a good payment by the banker as against the party drawing the check. It is true that the principle above referred to has been hitherto chiefly applied in those cases in which the instruments were not under seal: but, in The Bank of Ireland *v.* Trustees of Evans's Charities, 5 House of Lords Cases 389, where a fraudulent transfer of stock had been effected by means of a power of attorney improperly sealed with the seal of the respondents, alleged to have been negligently intrusted to their secretary, and where it was held that the negligence which would preclude the respondents from insisting that the transfer was invalid, must be immediately con-

*441] nected with the *transfer itself, there was no distinction whatever taken, although Young *v.* Grote, and the principle upon which it was decided, were fully discussed, and put upon the ground of estoppel, which would seem equally applicable to both classes of instruments: see also The Sheffield and Manchester Railway Company *v.* Woodcock, 7 M. & W. 574.†

Assuming, however, that, if the present inquiry related simply to ascertaining the strict legal title of the transferees of the shares in question, difficulty might arise from the fact that Oliver had no authority under seal to complete the transfers, according to the rule laid down and acted on in the case of Hibblewhite *v.* M'Morine, 6 M. & W. 200,† yet that difficulty, at best of a technical character, does not appear to me to create any embarrassment on the present rule, where the application is made to the equitable jurisdiction of this court, under an act of parliament which, whilst conferring large discretionary powers for the

purpose of rectifying the register, at the same time provides that those powers are to be exercised by the court only "if satisfied of the justice of the case." The position of Mr. Swan, upon these affidavits, is not, in my opinion, such as to entitle him to claim the interposition of this court in his favour under the provisions of that statute; his reckless execution and delivery of blank transfers for the express purpose of enabling Oliver to effect sales of shares in a manner contrary to law, which he must be taken to have known, has mainly contributed to the loss which has occurred, assisted (at least as to 500 of the shares) by his depriving himself of the safeguard of a notice of the intended transfers, by giving Oliver's address as his own. Had the parties against whom he applies contributed to the misfortune by any laches on their part, or by improperly omitting to do anything which *could have pre- [*442 vented it, the case might have been different, according to Vice-Chancellor Wood, in Tayler *v.* The Great Indian Peninsular Railway Company and Others, 28 Law J., Chan. 285, where it was held by that learned judge that negligence on the part of transferees of shares in accepting transfers with the numbers of the shares and the names of the purchasers in blank, deprived them of the right to insist on the negligence of the vendor in executing and delivering to the broker such blank transfers: but, in the present case, the transfers are sworn to have been complete upon the face of them at the time of the sale, and it is not suggested in the affidavits that the transferees, much less the present holders of the shares in question, took them otherwise than bonâ fide, and in the ordinary and regular course of business.

Under these circumstances, I think Mr. Swan has not entitled himself to claim the assistance of this court as against innocent parties, in order to get rid of the consequences of his own negligence, and the effects of his misplaced confidence.

I am therefore of opinion that the rule should be discharged.

WILLIAMS, J.—This was an application made under the 25th section of the 19 & 20 Vict. c. 47 (Joint Stock Companies Act, 1856), whereby it is enacted, that, "if the name of any person is, without sufficient cause, entered, or omitted to be entered, in the register of shareholders of the company, such person or any shareholder of the company may, by motion in any of Her Majesty's superior courts of law or equity, apply to such court for an order that the register may be rectified; and the court may either refuse such application, with or without costs to be paid by the applicant, or it may, if satisfied of the justice of the case, make an order for the *rectification of the register, and [*443 may direct the company to pay all the costs of such motion or petition, and any damages the party aggrieved may have sustained; and, if the company makes default, or is guilty of unnecessary delay in registering any transfer of shares, they shall be responsible to any person injured by such default or delay for the amount of damage he may thereby have sustained."

And by the 9th section of the 20 & 21 Vict. c. 14, it is enacted that the court may, in any proceeding under the above-mentioned section of the former act, "decide on any question relating to the title of any person who is a party to such proceeding, to have his name entered or erased from the register, whether such question arises between two or more holders or alleged holders of shares or stock, or between any

holders or alleged holders of shares or stock and the company; and, generally, the court may in any such proceeding decide any question that it may be necessary or expedient to decide for the rectification of the register."

Mr. Swan has made this application on affidavits which disclose that his name was formerly on the register of the North British Australasian Company as the proprietor of 1000 shares thereof, but was removed therefrom, and other names substituted in lieu of his, by reason of transfers of them purporting to have been executed by him, but which were forgeries perpetrated by one Oliver, who had on other occasions acted as broker for the applicant. He, therefore, having discovered these facts, requested the company to re-enter his name on the register, as the proprietor of the shares; but the company refused to do so, and thereupon this application is made, on the ground that his name is omitted to be entered on the register without sufficient cause, for an order that the register may be rectified.

*444] *The application is resisted on the ground that the forged transfers were to persons who were bonâ fide buyers of the shares, and that Oliver was enabled to perpetrate the forgery by the carelessness of the applicant, who had been induced by Oliver to sign, for another purpose, transfers in blank, which he fraudulently filled up with the transfer of the shares in question; and it was contended,—first, that, under the circumstances, the transaction was binding as against bonâ fide buyers, on the principle of the case of Young *v.* Grote, 4 Bingh. 253 (E. C. L. R. vol. 13), and also the cases in which a man who has signed an acceptance in blank, is presumed to have given authority to fill it up with any amount which the stamp will cover,—and, secondly, that, at all events, the court ought not to deal with such a question on motion, especially as there is no appeal against our decision.

With respect to the latter ground of objection, the court must necessarily feel great reluctance to entertain in this shape, and to decide without appeal questions of this kind, on which the right of property to an enormous amount will depend. But the language of the two acts, taken together, appears to me to be such as to leave no doubt that the legislature has thought proper to make it our duty to do so, inasmuch as it has enacted by the latter statute that the court may, in proceeding under the former, decide the question of the title of the applicant to have his name entered on the register, and any other question that it may be necessary or expedient to decide for the rectification of the register. And the court having this power, I think the applicant has a right to call on us to exercise it, in order to give him the benefit of the enactments, if he can maintain his title. In a case before Vice-Chancellor Wood, which occurred before the latter act passed, In re The British Sugar Refining Company, 26 Law J. Chan. 369, his Honour was of

*445] opinion that the 25th section of *the earlier act was not meant to apply where the title came in question. But if the case had arisen after the passing of the latter act, I think it probable that learned judge would have taken a different view.

But the question remains whether the applicant has lost his right to the shares. The case of Young *v.* Grote has been recently recognised in this court, and its authority cannot be disputed. It is thus stated by Parke, B., in Roberts *v.* Tucker, 16 Q. B. 560 (E. C. L. R. vol. 71),—

"In that case the customer had signed blank checks, and left them with his wife to fill up; she filled them up in such a manner that the holder was enabled to add to the amount; and it was held that the bankers who had paid this larger amount might charge their customer with it. This was, in truth, considering that the customer had, by signing a blank check, given authority to any person in whose hands it was, to fill up the check in whatever way the blank permitted." This view of that decision appears to be put on the same principle as that of Shultz *v.* Astley, 2 N. C. 544 (E. C. L. R. vol. 29), 2 Scott 815 (E. C. L. R. vol. 30), where it was held, that, by accepting a bill in blank, authority is given to draw the bill for any amount which the stamp will cover, not only to the party who has obtained the blank acceptance, but also to a stranger (which case was mentioned by Crompton, J., in Stoessig *v.* The South-Eastern Railway Company, 3 Ellis & B. 549, 556 (E. C. L. R. vol. 77), as one which went to the utmost extent of the law). In the case of The Governors and Company of the Bank of Ireland *v.* Trustees of Evans's Charities, 5 House of Lords Cases 410, Parke, B., in delivering the opinion of the judges, adverted to Young *v.* Grote, as having been decided on the ground that it was the fault of the drawer of the check that he misled the banker on whom it was drawn, by want of proper caution in the mode of drawing the check, and consequently that the drawer could not complain of the payment which *was caused by such neglect. But Lord Chancellor Cranworth spoke of that [*446 case as proceeding on the ground (whether correctly arrived at in point of fact was immaterial) that the plaintiff was there *estopped* from saying that he did not sign the check for the larger amount. However, in Marston *v.* Allen, 8 M. & W. 494, 504,† Alderson, B., in delivering the judgment of the Court of Exchequer, refused to adopt the proposition, that the previous party to a bill is *estopped* from setting up the defence of fraud against the case of a bonâ fide holder for value, and thought it better to say that by the law-merchant every person having possession of a bill, has, notwithstanding any fraud on his part, either in acquiring or transferring it, full authority to transfer it to a bonâ fide holder for value. It seems, therefore, doubtful whether the cases as to the liability of a man who signs a blank bill or note or check, are founded on the doctrine of estoppel, or on a rule of law-merchant that an actual authority is thereby conferred on the person in whose hands the instrument is. It is, however, plain that none of the decisions as to the effect of signing instruments in blank extend beyond the case of negotiable instruments. And it seems to me that it would be inconvenient and dangerous to apply the principle of them any further. If a man were induced to sign, seal, and deliver to his attorney a deed of conveyance with the parcels in blank, upon the understanding that it should be filled up by a description of estate A, it would surely be difficult to contend, that, if the attorney were fraudulently to fill up the blank by a description of estate B, the latter would pass to a bonâ fide purchaser, who paid for the estate on the supposition that he was buying the latter estate.

It is not, however, in this case necessary, in my opinion, to decide this question, because I think the *conduct of the applicant in [*447 signing the blank transfer was not such that a man of ordinary prudence and caution would have shunned it, as being attended with an

obvious risk of being taken advantage of by filling up the blank with a transfer of the shares in question. When that had been done, two things more must have happened, before the transaction would have been perfected. Some person must have been found either so dishonest or so careless as to attest Swan's execution without any letter or other voucher from him in any way authorizing or recognising the transaction. Secondly, the bankers with whom the certificates of the shares had been deposited must have been guilty of negligence in allowing them to be abstracted. It is one thing to say that a man shall be answerable for such immediate consequences of his acts as a reasonable man might well foresee and dread, and would therefore shun. But it is another and very different proposition to maintain, that a man shall forfeit his property because he has done an act which will not be perilous unless others are also guilty of misconduct which that act does not cause.

In my opinion such an act ought not to disentitle the applicant. even supposing the doctrine established that he would be disentitled if the filling up of the blank transfer had per se enabled Oliver to commit the fraud.

I am therefore of opinion that the rule ought to be made absolute; because I think the title of the shares has all along remained in the applicant.

But it is said, that, inasmuch as by this statute a motion may be made either in a court of law or of equity, the legislature must have intended that the rights of applicants must necessarily be regulated by the doctrines of both courts; and cases were cited to show, that, in a *448] court of equity, no relief would be *afforded to the applicant in this case, as against an innocent purchaser for value. But it is not proper, I think, to inquire whether the Court of Chancery would afford any relief in the exercise of its ordinary jurisdiction. If the statute means that the courts may be required to rectify the register, by making an order that the name of him who shall be found to have the right to the shares shall stand there, both courts must take the same course of ascertaining who has the title, and making or refusing an order accordingly; only with the obvious consequence, that, if the application be made to a court of law, regard must be had to the equitable as well as to the legal title.

WILLES, J.—It appears to me that the rule ought to be absolute. As a general rule, no one can found a title upon a forgery. The doctrine adopted in Young *v.* Grote, as to negotiable instruments, which form part of the currency, and therefore stand upon a peculiar footing, has never yet been extended to conveyances by deed of land or other property. I am unwilling to be the first to do so. The loss in this case should rest where it has fallen, namely, upon the supposed purchasers, who have parted with their money for nothing, or for what is nothing worth, and not upon the alleged vendor, who has never parted with his property either by his own act or that of any one authorized by him.

The court being thus equally divided, the rule dropped. (*a*)

(*a*) Mr. Swan has obtained a similar rule in the Court of Exchequer, which will be argued early in Michaelmas Term, 1860.

Whether the rule of the common law which prohibits the assignment of choses in action, was originally founded in sound policy or not, there can be no

doubt that it has always been in conflict with the exigencies of commerce. The first great victory of the latter was the withdrawal of bills of exchange and promissory notes from the operation of the rule. This, however, was principally effected by statute, but there has been ever since a steady effort, to which the courts in this country have gradually yielded, for emancipation of other commercial instruments. For bills of lading a qualified negotiability has been secured. Public loans, when evidenced by bonds or debentures, payable to bearer, and usually passing from hand to hand by delivery only, are held to be negotiable by usage. See Delafield *v.* State of Illinois, 2 Hill, N. Y. 177, 26 Wend. 192; Gorgier *v.* Mieville, 3 Barn. & Cress. 45; Wookey *v.* Pile, 4 Barn. & Ad. 1; Lane *v.* Smith, 7 Bing. 284. Ordinary bonds have also, in some of the United States, been made assignable by statute. But there is some difficulty in saying how much farther the courts will proceed in this direction, particularly with regard to shares or certificates of stock in incorporated companies.

Such shares or certificates are usually, by express provision, made transferable only on the books of the particular corporation. But this is for reasons which are independent of the general question. Its effect is evaded in practice, and the complete negotiability of the stock secured, or intended to be so, by the delivery of the certificates to a purchaser, with a blank power of attorney to make the requisite transfer when desired. Here, however, a technical difficulty arises from the fact that, at common law, a sealed instrument cannot be executed in blank: it must take complete effect at the instant of its delivery or not at all. Even if the holder can be considered as the agent of the maker of the instrument to fill in the blanks at a future time, as was held by Lord Mansfield in Texira *v.* Evans, cited in 1 Anstruther 228, still this authority could only be itself validly conferred by another instrument under seal. This was the view taken by the Court of Exchequer, in Hibblethwaite *v.* M'Morine, 6 Meeson & Wels. 200, where such blank powers of attorney were held to be absolutely void. This decision has been followed in more recent cases in England, and particularly in Taylor *v.* The Great, &c., Peninsular Railway, 28 L. J. Ch. 285, 709, where Vice Chancellor Wood held, and it was affirmed on appeal, that evidence of the universal custom of the stock exchange to treat the delivery of stock certificates, with blank transfers, as giving a complete title to the stock, was inadmissible, as contravening an express rule of law.

A much more liberal doctrine on this subject prevails in the United States generally. The case of Texira *v.* Evans has been frequently followed there. It has been applied, without hesitation, even to cases of bonds in which the amount and name of the obligee have been left blank, and placed in the hands of an agent for the purpose of raising money, with parol authority to fill up the blanks with the requisite amount: Siegfried *v.* Levan, 6 Serg. & R. 170; Stahl *v.* Berger, 10 Id. 170; Wiley *v.* Moore, 17 Id. 438; Woolley *v.* Constant, 4 Johns. 54; Ex parte Kerwan, 8 Cow. 118; Smith *v.* Crocker, 5 Mass. 538; Camden Bank *v.* Hall, 2 Green, N. J. 585; Duncan *v.* Hodges, 4 M'Cord 239: and this doctrine has now received the deliberate sanction of the Supreme Court of the United States in the recent case of White *v.* Verm. & Mass. Railroad Co., 21 Howard 577, where it was held that bonds of a railroad company in Massachusetts, payable in blank, no name of any payee being inserted, but issued to a citizen of Massachusetts, which had passed through the hands of several intermediate hold-

ers, could be filled up by a citizen of New Hampshire, so as to make them payable to himself or order, and that he could then maintain suit upon them in the Circuit Court of the United States for Massachusetts.

The question as to the validity of these blank powers of attorney came up directly in Kortwright *v.* Comm. Bank of Buffalo, 20 Wend. 91, 22 Id. 348, where it was held that a blank endorsement, under the hand and seal of the original holder, on a certificate of stock in a bank, authorized a subsequent holder for value to write above it a power of attorney to transfer on the books of the bank, and that the bank, refusing to allow such transfer to be made, was liable in an action of assumpsit for the value of the stock. In the Court of Appeals, however, it was considered by the chancellor and a minority of the court, that the holder of the certificate and power did not take a complete title to the stock, but only an equitable right. This view was adopted in the subsequent case of Dunn *v.* The Commercial Bank of Buffalo, 11 Barb. 584, where it was held that a bank is under no obligation to permit a transfer of its stock to be made on its books to a person claiming to be the assignee of a certificate, on the mere presentation of such certificate, with an assignment and power of attorney executed by the original holder in blank, no person being named or specified as the assignee or attorney; and that no action could be maintained against the bank for a refusal to allow such transfer by the holder, unless he could show that he was a bonâ fide purchaser for value, the mere naked possession of the certificate and power not being evidence of title. On the other hand, in Fatman *v.* Lobach, 1 Duer 361, it was held by the Superior Court of the city of New York, that a power of attorney in blank for the transfer of stock, with a delivery of certificate, constitutes a complete equitable ownership; and in the subsequent case of Leavitt *v.* Fisher, 4 Duer 20, the same point was decided, and it was said that so far as that court was concerned "it must be considered as settled that where a certificate of shares of stock and an irrevocable power of attorney from the owner to transfer them, with a blank for the name of the attorney, are in the hands of a third person, the holder of the securities, as they may properly be termed, is presumptively the equitable owner of the shares, and that when he is shown to be a holder for value his title as such owner cannot be impeached. That such power is not limited to the person to whom it may first have been delivered, but enures to the benefit of each bonâ fide holder into whose hands the certificate and power may subsequently pass, each successive holder having the right to fill up the blank, and execute the power or cause it to be executed, whenever the protection of his own interests, as a pledgee or absolute owner, may require it. That the power is not exhausted by the first use to which it is applied, nor revoked by the death of the party giving it, but unless surrendered to the person who gave it, or cancelled, continues in force until its execution by an actual transfer of the shares to which it relates; and that the validity neither of the power nor of the transfer is at all affected by the number of persons through whose hands the certificate and power, since their first delivery, may have passed." In the subsequent case of Mechanics' Bank *v.* The New York and New Haven Railroad Co., 3 Kern. 621, 625, while it was admitted that the transfer of a certificate of stock with a blank power, gives an equitable ownership to a bonâ fide purchaser for value, it was nevertheless held by the Court of Appeals, that where the original holder of the stock had no title as

against the corporation, as in the case of a fraudulent over-issue of stock, the purchaser stood in the same position, and took no title himself. The case of Fatman *v.* Lobach was questioned.

In Fisher *v.* Essex Bank, 5 Gray 373, it was held that under the usual provision in the charter of a bank that its stock should be transferable only at its banking-house and on the books of the bank, the delivery of a certificate of stock with a blank power, to a purchaser, conferred on him no title as against a subsequent attachment or execution levied on the stock by a creditor of the original holder, before an actual transfer on the books of the bank by virtue of the power. It was said by the court that the legal title remained in the holder, and that creditors and purchasers were only bound by the state of the registry at the time of the purchase or levy. See also Turnpike Company *v.* Bunnell, 6 Conn. 558..

It has been recently held in New York that where a bank permits a transfer of stock on a forged power of attorney, and cancels the original certificate, it may be compelled to issue a new certificate to the real owner, or if no shares remain which it can lawfully issue, then that it is liable to pay him the value of the stock: Pollock *v.* National Bank, 3 Selden 274.

*SWEETING *v.* PEARCE. *May* 26. [*449

The plaintiff, a ship-builder in London, employed one W., an insurance-broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he had retained possession of it. An adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known *to the plaintiff*, who had merely left the policy in W.'s hands for safe custody,—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—

Held, that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy *in money*, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement.

THIS was an action on a policy of insurance in the usual form on the ship Caroline and freight, on which the defendant was an insurer for 50*l.*, the declaration alleging a total loss.

The defendant pleaded,—first, payment.

Secondly, that Walton & Sons were the insurance-brokers and agents of the plaintiff, and after the loss were authorized by the plaintiff to adjust and settle the loss, which they did at 96*l.* 13*s.* 9*d.* per cent.; that, at the time of the adjustment and settlement, Walton & Sons were indebted to the defendant on the account between them as brokers and the defendant as underwriter in a sum exceeding the defendant's proportion: and that, by the authority and with the sanction of the plaintiff, Walton & Sons accepted a credit in the account with the defendant as satisfaction.

Thirdly, that the plaintiff employed Walton & Sons, who were brokers at Lloyd's, as his brokers to procure the policy to be underwritten there for him, and they procured it to be underwritten for 50*l.* by the defendant, who was an underwriter there, in the usual and cus-

tomary manner, and afterwards, a total loss with benefit of salvage having occurred, the plaintiff employed Walton & Sons as his brokers to have his claim on the policy adjusted and settled in the usual and customary manner, and for that purpose intrusted them as such brokers with the policy; that Walton & Sons as such brokers for the plaintiff did in the usual and customary manner adjust the claim with
*450] *the several underwriters, including the defendant, at 96*l.* 13*s.* 9*d.* per cent., and, as such brokers for the plaintiff, at the usual and customary times, settled the claim with the underwriters, and by the usage and custom of Lloyd's, well known to all brokers and underwriters, and to all merchants and shipowners making insurance in general, a broker so employed to make a policy and to adjust and settle a claim thereon, and so intrusted with the policy for that purpose, has, as incidental to such employment and intrusting, authority from the assured so employing and intrusting him, and is held out to the underwriters dealing with him as from such employment and intrusting having authority from the assured, to accept and receive in satisfaction of the claim against each underwriter a credit in the usual and customary account between that underwriter and the broker, as underwriter and broker, at the usual and customary time, if that account is at the adjustment and settlement good for that amount, and thereby at the usual and customary time to discharge the underwriter, and become himself liable to the assured, unless the assured before then intervene, and give notice to the underwriter of such intervention. The plea then averred, that the account between Walton & Sons and the defendant as broker and underwriter was at all material times good for a greater amount, and that Walton & Sons, as brokers for the plaintiff so employed and intrusted as aforesaid, accepted, and the defendant as underwriter, confiding in the usual and customary authority given to Walton & Sons by such employment and intrusting, gave to Walton & Sons credit in the account in satisfaction of the plaintiff's claim, and all times elapsed and all things happened to make that credit in account a good and final discharge of the defendant as underwriter according to the usual and
*451] customary course, and to make *Walton & Sons as brokers debtors to the plaintiff according to the usual and customary course, and the plaintiff never intervened or gave notice to the defendant till after the stoppage of Walton & Sons, and the settlement was in all respects in pursuance of the authority conferred by usage and custom on a broker so employed and intrusted; and that the defendant afterwards, relying on the settlement, gave fresh credit to Walton & Sons for premiums to an amount exceeding the claim. The plea also contained a final averment that the plaintiff, at the time he so employed and intrusted Walton & Sons to adjust and settle the claim, had notice of the custom and usage.

The fourth plea was similar to the third; but, instead of the final averment of notice of the usage at the time of the employment, it alleged subsequent notice to the plaintiff, and an adoption by him of Walton & Sons as his debtors, and a ratification of their acts.

The fifth plea was similar to the third, with the exception that it did not contain the final averment that the plaintiff had notice of the custom, and averred that the credit was given and accepted without any notice to the defendant from the plaintiff, or otherwise, that the plaintiff had

in any respect restricted or limited the authority of Walton & Sons, or given them an authority more limited than by custom or usage aforesaid conferred on brokers so employed and intrusted, and in the bonâ fide belief that they had such authority.

The cause was tried before Cockburn, C. J., and a special jury, at the sittings in London after Michaelmas Term, 1858. The following is a statement (settled by the learned judge) of so much of the evidence and proceedings as is material to the point reserved :—

The defendant began, and proved by Mr. Natusch, an *insurance-broker at Lloyd's, who had been so for more than [*452 twenty-five years, and was well acquainted with the custom there, that an account is always kept by the broker with each underwriter. When the broker effects an insurance for a principal at Lloyd's, he credits the underwriter in the account between them with the premium. The broker also keeps an account with the assured. In that he debits the assured with the premiums. The account between the broker and underwriter is settled every year. All the premiums in the course of the year go into it on the credit side. It is settled at the end of the year, when the broker is allowed a discount depending on the amount of the balance: it is 12 per cent. on the balance then due to the underwriter. The account is always stopped by a loss wherever it takes place.

Sometimes the broker retains the policy. If a claim is to be made on the policy, and the policy is in the broker's hands to obtain the amount of such claim, the settled amount of such claim is put to the debit of the account between the broker and the underwriter. In such case, the following is the course pursued at Lloyd's:—The broker, having prepared or obtained through the medium of an average-stater a statement of the claim, makes an endorsement upon the policy, in the following form,—"Settled a loss upon this policy of [so much] per cent." The policy so endorsed is put before the underwriter for his assent to the claim; and, if the underwriter assents to the claim, he puts his initials to the endorsement. When the claim is so adjusted and settled, the amount is put to the debit of the underwriter.

The account is stopped when the loss is known; but the loss is not carried to account till it is adjusted.

If the amount of the premiums due to the underwriter up to the time when the loss was first known at *Lloyd's exceeds the amount [*453 so adjusted, such amount is considered as paid at the end of a month from the date of the adjustment by the underwriter. If such amount of premiums is not sufficient to cover the loss, the underwriter at the end of the month gives a check for the difference. This is what is technically called the account being good or not for the loss.

If, for instance, on the 13th of June, a loss became known, and the balance due from the broker to the underwriter on that day was 20*l.*, the account would be good only to that amount; if then, on the 30th of October, the loss was settled at 100*l.*, the underwriter would pay the broker in cash 80*l.* on November the 30th, that is, one month after the date of the adjustment.

It is very common, where a claim is large, to agree upon an adjustment on account, leaving the balance to be adjusted afterwards. In such a case, the amount of the adjustment on account is equal to cash

a month after that adjustment on account. The amount of the final balance is cash a month after the adjustment of it. The same process is pursued with regard to returns of premiums. If the account continues good to the end of the month, the carrying to the account is a payment from the day it becomes equal to cash. If it is not good, the underwriter pays the balance to the broker in cash on that day.

It was proved that the endorsements on the policy on which this action was brought were in the ordinary form.

The witness further stated that it is unimportant whether the signatures of the underwriters who have initialed the policy are struck through or not, though formerly the name was very often struck out: that sometimes it is done, and sometimes it is not.

*454] It was also proved, that the broker on the settlement *usually sends the assured a credit note either endorsed on the policy or on a separate paper. In that he states the whole amount, and when it is due. There is by the general custom between brokers and assured a period of credit between them. It is ordinarily three months from the time of settlement; but that is subject to arrangement. Many brokers pay in a month, deducting discount; but that is matter of arrangement.

The said insurance-broker, on cross-examination by the counsel for the plaintiff, said that such custom, in the absence of special arrangement, was, that the broker had two months' credit from the time he had the money (that is, three months' credit from the date of the settlement): if there was any payment by the broker before that day, it was under discount; but that the practice of brokers varied very much. It was also proved that the name of the underwriter was more usually struck off the policy than not: but it was often left undone.

None but members and subscribers have a right of entrance at Lloyd's: nobody else is allowed to transact business there. Many merchants are members; but no one can become a member or subscriber, unless elected.

The statement of what is due on a loss is generally first prepared by an average-stater. In the majority of cases that is acted on; but it is often questioned.

The amount of the loss is carried to the account immediately upon the adjustment, and not at the end of the month. Sometimes a considerable time elapses after the knowledge of a loss, before settlement. It is not usual to adjust a loss till the papers come home.

On re-examination, the witness stated, that, at any time during the month after adjustment, the assured may intervene and give notice to *455] the underwriter not *to pay the broker: that is sometimes done; then the underwriter must at the end of the month pay the principal in cash.

The average-statement is prepared by the broker or some other person acting for the assured. It is not the adjustment or settlement, but contains the particulars of the claim. The adjustment is the agreement of the underwriter to the per centage claimed, as shown by initialing the memorandum endorsed on the policy. The striking off the name is more frequently done than not, but is no necessary part of the operation. The entry in the account between the broker and underwriter is made as of the date of the adjustment. It is not necessarily actually

entered on the day of adjustment. That depends on how often the books are written up.

The witness, being recalled, stated, in answer to a question put to him by the Lord Chief Justice, that the premiums are generally put down to the debit of the assured in account between the broker and the assured, and that the amount of the settled loss is put in the same account to his credit, and only the balance of that account paid.

On the close of the examination of this witness, the plaintiff's counsel stated, with the exception of that part of it which related to the credit usually taken by the broker (which he was not prepared to admit), the custom as between broker and underwriter stated by this witness was correct, and no further trouble need be taken to prove it.

The defendant then called several brokers who made policies at Lloyd's on a very extensive scale for many merchants and shipowners, and other mercantile witnesses, who gave evidence that the custom was generally known to merchants and shipowners in general, whether belonging to Lloyd's or not.

*In the course of this part of the case, some further explanations of the practice were elicited; and Mr. Natusch was recalled. [*456
The statements of the witness were, that the broker, if he paid his principal during the first month after the adjustment, required discount, and also a del credere commission for guarantying the solvency of the underwriter, or else a written promise to return the money if at the end of the month the underwriter did not pay the broker.

The defendant's counsel then proceeded to prove the facts as to this particular adjustment.

William Henry Hulbert proved that he was clerk of the defendant at the time of the settlement, and that it was his department to underwrite and settle policies for the defendant. In 1857, there was an account kept between Charles Walton & Sons and the defendant, which the witness himself wrote up. [This account was produced and shown to the witness.] The loss by the Caroline became known at Lloyd's on the 7th of September, 1857. At that date the account between Charles Walton & Sons and the defendant was good for considerably more than 50*l.* Afterwards the loss was adjusted by the witness himself. There was on the 20th of October, 1857, a settlement on account of 95*l.* per cent. endorsed on the policy. The witness then initialed it for the defendant. Afterwards, on the 26th of November, there was a final adjustment of 1*l.* 13*s.* 9*d.* per cent., which was also endorsed on the policy, and was initialed by the witness for the defendant. The witness himself entered both those sums in the defendant's account with Charles Walton & Sons, to the credit of the latter,—the one under the 19th of October, 1857, and the other under the 30th of November. The witness stated that the entry as of the 19th of October was either a clerical error or that the claim was considered as adjusted on *that day, [*457
though not so considered by the brokers till the next day. The account on the 5th of September, when the loss was known, was good for more than 50*l.*: and it continued good for more than that sum up to the end of the year. At the end of the year the balance was struck; and, after giving the brokers credit for the loss on the Caroline, it was in favour of the defendant. The fresh credit for premiums subsequent

to the time of the final adjustment, and before the end of the year, exceeded 50*l.*

The witness further proved, that, in the previous year (1856), there had been a return of premium on the Caroline, which was settled in the account between Charles Walton & Sons and the defendant in the same manner.

Nicholas Gibson gave evidence that he was clerk to Charles Walton & Sons, and that they kept an account with the defendant in the usual way as brokers. The witness himself effected the insurance on the Caroline. The plaintiff had been for many years a client of the firm now represented by Charles Walton & Sons at least for nine or ten years, and sometimes gave instructions about insurance personally to the witness. The plaintiff himself twice went with witness to Lloyd's to inquire about the rate of premiums; and the witness believed the plaintiff did so on the occasion of effecting the present policy; but the plaintiff was not there when the policies were actually underwritten. The premiums on this insurance were carried to the account between Charles Walton & Sons and the defendant. The loss on the Caroline became known on the 7th of September. The policy remained in Charles Walton & Sons' hands from the time it was made.

The plaintiff brought the papers to the office, to enable Charles Walton & Sons to adjust the loss. It was a total loss, with benefit of salvage.

*458] The witness *stated that he thought no average-statement was prepared at first. An amount was settled on account in the first instance. The whole amount settled was 96*l.* 13*s.* 9*d.* per cent. It was carried to account in Charles Walton & Sons' books as one sum under the date 20th of October; but it was not actually entered in the books till after the final settlement on the 26th of November. The witness himself wrote out the settlements on the policy, and sent them round to be initialed.

On cross-examination, the witness stated, that the plaintiff, before the policy was effected, saw the defendant at Lloyd's, and negotiated with him about the amount of the premium; that, from what then passed, the defendant must have known he was the party interested in the ship; and that the 95*l.* per cent. was adjusted before the papers came home.

Charles Walton & Sons stopped payment on the 23d of January, 1858.

The papers were brought to the office of Charles Walton & Sons after the settlement on account, and before the final settlement of the balance. The witness did not remember telling the plaintiff that 95*l.* per cent. had been settled on account, nor whether he was asked or not; but, if he was asked, he certainly would have told him so. He did not recollect being asked by the plaintiff when the money would be due: but, if asked, he certainly should have answered "Due in three months from the settlement," for that was always witness's answer. Was quite certain that he never said that the underwriters always took three months to pay, or anything to that effect. Had no recollection of plaintiff saying anything about it, or turning to Mr. Beech and saying "Did you

*459] ever hear of underwriters taking three months?"

*A paper was then put in and read, in the following terms:—

"1857. Nov. 5. To settlement on account loss per Caroline, 3000*l.* at 95 per cent. 2850 0 0
Less 1 per cent. for settling 28 10 0

Due 5th January, 1858 . . . . . £2821 10 0

"E. & O. E. 6th Nov. 1857.

"CHARLES WALTON & SONS."

The witness said that he did not know why the date was 5th of November instead of 20th of October. Perhaps the policy had been kept back by some underwriter, and November 5th was the date of the last underwriter initialing: but, unless there was something of that sort, the witness could not account for it.

Some other evidence which in the result proved not material was given, and the defendant's case closed.

The plaintiff's counsel then and in support of his case called evidence of which the material facts were as follows:—

The plaintiff, George Waters Sweeting, gave evidence that he was a ship-builder at Rotherhithe, and was not a member of Lloyd's. In 1854 he became owner of the Caroline. In 1857, he instructed Charles Walton & Sons to get her insured, and himself saw the defendant on that occasion, and told him that he was owner of the Caroline. The witness heard of the loss early in September. He then went to Charles Walton & Sons' office, and there saw Walton himself. The policy was then with Walton. Witness always left his policies at Waltons' for safe custody. Had only had one loss before,—nine years ago. On that occasion old Mr. Walton received the money for him. Had had one return of premium on the ship Caroline. That also Charles Walton & Sons received for him: but he *had given specific directions in [*460
those two cases to receive the money. In this case no directions to receive the money were given by the plaintiff. The plaintiff stated he avoided giving such directions, because he knew Walton & Sons' pecuniary position. Afterwards, on the 16th of November, witness got the ship's papers, and took them to Charles Walton & Sons'. Witness was not aware that the money was due from the underwriters. The witness heard of the usage at Lloyd's four or five days after Waltons' stoppage. He learnt it from one of Waltons' clerks. He had never heard of the custom before. The witness stated, on the 7th of November he saw the witness Gibson, and asked him when the money would be due from the underwriters. Gibson answered, "In three months." Witness said, "Do underwriters take three months to pay after having settled?" and Gibson said, "Yes, it is the custom: they always take three months." Witness turned to Mr. Beech, a shipowner, who came in, and told him what Gibson said. He said to Gibson, "Is it so?" Gibson said, "Yes; it is the custom," or words to that effect. Witness and Beech then went into Walton's private room and saw him. Witness repeated what Gibson had said; and Walton said, "Oh yes; it is the custom. You will have to wait three months." He then handed witness the credit-note (previously read as part of the defendant's case). Witness stated that he made other applications to Charles Walton & Sons with a view to obtain the money from the underwriters, being in want of it; and that neither then nor at any time till after Charles

Walton & Sons' bankruptcy was he aware that he could have got the money by applying to the underwriters.

That credit-note was delivered to him on the 7th of November, and was the first time witness heard of the adjustment on account. Witness *461] knew nothing of the *amount being credited in account, or of the custom, till after the stoppage, about the end of January, when it was explained to him. Charles Walton & Sons were indebted to witness.

On cross-examination, the witness stated that he had owned several ships, which were all insured through Charles Walton & Sons.

The witness was then asked,—"When you first knew of the loss, what did you do to get paid?" He answered,—"I went to Mr. Walton, and related the circumstances to him. I did not demand the policy from him, because, if I had had it in my own possession, I should have delivered it to him to lay before the underwriters as soon as I could get the papers. I knew of no other course. Afterwards, on the 16th of November, when I got the papers, I took them to Mr. Walton, and requested they might be sent immediately to an average-stater, which Mr. Walton told me was necessary, to make up the amount to claim from the underwriters, and which I believed to be necessary on all occasions. I gave no specific directions what was to be done with the statement when prepared. I afterwards asked to see it, and was told it was before the underwriters."

The witness was cross-examined as to other matters which are not material to the point now raised. He further stated that he knew that underwriters did not pay at once,—that they took some time,—a month or so: but did not know how long; and was surprised when told it was three months; that he employed Charles Walton & Sons to make the claim, and left the papers with them in order to have the loss adjusted, because he could not go into Lloyd's to do so himself, and thought he was bound to employ the broker who made the policy to do so: but that he *462] did not understand that they were to collect the money *from the underwriters; and that he never authorized them to receive the money; that his belief then was that the underwriters would not pay it till due, and they would not even then pay it to the broker without a written authority from him, the assured.

Mr. Beech was next called, and stated that he was present at the interview between the plaintiff and Gibson and Walton on the 7th of November, and corroborated the plaintiff. He himself was a shipowner residing in London, and was quite ignorant of all the usages.

Some other shipowners, also resident in London, were called, who did not know of this usage.

It was then admitted that the first application on behalf of the plaintiff to the defendant was on the 3d of February, after Charles Walton & Sons had stopped payment.

The Lord Chief Justice then inquired whether it was intended to take the opinion of the jury on the question whether the plaintiff himself had knowledge of the custom and usage.

After some discussion, it was admitted by the defendant's counsel that the plaintiff was ignorant of the usage in question, and that he did not intend Charles Walton & Sons to receive the money; and that he did not in fact leave the policy in the hands of Walton & Sons to enable

them to receive the money, unless the legal effect of leaving the policy there was such.

Subject to these admissions,—the effect of which in point of law it was agreed was to be reserved to the court,—the cause went to the jury on the question whether the usage was generally known to merchants and shipowners effecting insurances: and the jury found that it was.

The only material thing is the finding of the jury: summing up has become wholly immaterial.

*The Lord Chief Justice then directed that the verdict should be entered for the plaintiff for the amount claimed, subject to leave to the defendant to move to enter the verdict for him on any or all the issues, leave being reserved to either side to amend the pleadings in any way that might be necessary to raise the real question. [*463

James Wilde, Q. C., in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the defendant on the whole of such issues, or on such of the same as the court should direct, on the ground "that the evidence given at the trial proved the issues for the defendant." He referred to Stewart *v.* Aberdein, 4 M. & W. 211,† Cuthbert *v.* Cumming, 11 Exch. 405,† Greaves *v.* Legge, 11 Exch. 642,† Taylor *v.* Stray, 2 C. B. N. S. 175, 197 (E. C. L. R. vol. 89), and Story on Agency, § 443.

Montague Smith, Q. C., and *Honyman*, in Trinity Term, showed cause.—It was incumbent on the defendant to show that Walton & Sons had authority to receive from the underwriters the amount of the loss, and, further, that their authority extended to setting it off against a debt due from themselves to the underwriters. It is submitted, in the first place, that there was no evidence that they had authority to receive it at all. The policy was not left with them for that purpose, but merely for safe custody. [COCKBURN, C. J.—The plaintiff swore distinctly that he thought a further authority in writing would be necessary to enable Walton & Sons to receive the money. The real question is, whether the custom alleged in the third and fourth pleas is binding on all persons insuring at Lloyd's; whether they knew of its existence or not.] Generally speaking, an agent authorized or employed to receive money can only receive it in cash. *The result of the finding as to the usage, is, that it was generally, not universally, known. [*464 The course of practice between the broker and the underwriter is thus stated in 1 Arnould on Insurance, 2d edit. p. 119:—"The insurance-broker opens a separate account with each separate underwriter with whom he effects policies for his different principals, and the underwriter opens a like account with the broker. In this account the broker *credits* the underwriter in *his* books for all premiums payable on the different policies subscribed by that particular underwriter (less his commission of 5 per cent. thereon), and *debits* him for all losses and returns of premium which may take place on any one of the policies so effected. The underwriter in like manner enters in *his* books all premiums payable to him, to the debit of the broker, and credits him for all losses that may become due. When a loss has occurred, and the per-centage payable by the underwriters in respect of it is ascertained, an endorsement to that effect is made on the policy, which is frequently in the following form: 'Adjusted £— per cent. on loss by the [*name of ship*], payable in a month.' The policy thus endorsed is taken round to each

of the underwriters, who signs his initials under such endorsement. This is called the *adjustment of the policy*. If upon this adjustment it be found, on examining the accounts, that the sum then due from the broker to the underwriter for premiums, on the general account between them, exceeds the sum due to [from] the underwriter for losses and returns of premium, the account is said to be *in favour of the underwriter*, who generally strikes his name off the policy at the time, and at the end of *a month from the adjustment* credits the broker in his books for the loss, and the broker on his side enters the loss to the debit of the underwriter. In this case no money whatever passes between the
*465] *broker and the underwriter; but the general account between them is carried on to the 31st of December in each year, when a balance is struck, which is either paid in money or carried on to the next year's account. If, on the other hand, upon such adjustment, it appears that the whole amount of losses exceeds the whole amount of premiums which had become due to [from] the broker up to the date of the knowledge of such losses, the underwriter, at the expiration of one month from the adjustment (which time is allowed him as an indulgence), either pays the amount to the broker in cash, or carries it on to the credit side of the broker's account, and at the same time strikes a pen through his subscription to the policy and his signature to the memorandum of adjustment. In either case, *as between the broker and underwriter*, the amount of the loss is considered as paid directly it is thus passed in account." At p. 149, it is said: "Lord Ellenborough, in a case that came before him at Nisi Prius,(*a*) and Lord Tenterden, in the two earliest cases of the same kind that presented themselves for decision in the Court of Queen's Bench,(*b*) seemed to consider that the authority given by the assured to the broker was only to receive losses from the underwriter *in money;* and that, therefore, nothing but actual cash payment by the underwriter to the broker, or a credit given to the underwriter by the assured himself, could estop the assured, in case of the broker's insolvency, from recovering against the underwriter. Lord Tenterden, however, subsequently admitted,(*c*) and the rule of law undoubtedly now is, that, if the assured, upon the whole facts of the
*466] case, can be shown to have *been cognisant of the usage of settling losses in account, at the time he procured the insurance to be effected, he shall be bound by it; and the fact that a loss has been passed in account according to the usage between broker and underwriter, shall preclude him from recovering such loss from the latter, on the insolvency of the former:" for which are cited Bartlett *v.* Pentland, 10 B. & C. 760 (E. C. L. R. vol. 21), Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), and Stewart *v.* Aberdein, 4 M. & W. 211.† In Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), one who was not found to have been in the habit of effecting policies at Lloyd's, was held not to be bound by the usages of that place. The principle of the decision in these cases is said by Lord Tenterden, in Bartlett *v.* Pentland, 10 B. & C. 770 (E. C. L. R. vol. 21), to be, that the usage of Lloyd's as to settling losses in account being "the usage of a particular place, or of a particular set of persons,

(*a*) Jell *v.* Pratt, 2 Stark. N. P. C. 67 (E. C. L. R. vol. 3).
(*b*) Todd *v.* Reid, 4 B. & Ald. 210 (E C. L. R. vol. 6), and Russell *v.* Bangley, 4 B. & Ald. 395.
(*c*) In Russell *v.* Bangley, 4 B. & Bld. 398.

cannot be binding on other persons, unless those other persons are acquainted with that usage, and adopt it." [COCKBURN, C. J.—Stewart *v.* Aberdein, 4 M. & W. 211,† seems to go much beyond Bartlett *v.* Pentland.] There, there was evidence that the plaintiff knew of the usage, and assented to the settlement on that footing. [COCKBURN, C. J.—In Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), the assured was resident in Glasgow. Here, the plaintiff is a shipowner in London: and there was evidence that the usage was generally known amongst merchants and shipowners in London. If a man carries on business at a particular place, or in a particular market, is he not estopped from setting up his ignorance of the usages which prevail there?] The cases proceed on the ground of the presence or absence of knowledge. Lord Tenterden, in Scott *v.* Irving, 1 B. & Ad. 612 (E. C. L. R. vol. 20), says: "The general rule is, that the broker is the debtor of the underwriter for the premiums, and the underwriter the debtor of the assured for the loss. If the usage *relied upon [*467 in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such a usage, however, can be binding only on those who are acquainted with it, and have consented to be bound by it. There may possibly be cases proved where an assured, being cognisant of such usage, may be supposed to have assented to it, and therefore may be bound. Here no such assent is shown." This is not like the case of Taylor *v.* Stray, 2 C. B. N. S. 175, 197 (E. C. L. R. vol. 89), where a broker employed to buy shares on the Stock Exchange was held to be impliedly authorized to deal according to the usages of that market. [WILLIAMS, J.—In Bailiffe *v.* Butterworth, 1 Exch. 425,† the court seem to take a distinction between the case of a contract for the purchase of shares and the case of insurance. There, the question arose upon the usage amongst brokers on the Liverpool Stock Exchange: and Parke, B., says: "It is not now necessary to decide the point whether the defendant would be bound if he did not know of such a usage. It appears to me, however, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way. There are some cases which look the other way, which have not been noticed. There is the case of Bartlett *v.* Pentland, 10 B. & C. 760 (E. C. L. R. vol. 21): that, however, was not with respect to the usage of the Stock Exchange, but of insurance-brokers; and it was there held that the custom which prevailed at Lloyd's Coffee House was not binding on a party who was not shown to be cognisant of it, or to have assented to it. That, however, is a different question from the present, which is one of contract. In the case of a contract which a person orders another to make for him, he is bound by that contract if it is made in the usual way. There is another case, of *Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. [*468 vol. 16), which was an action on a policy of insurance. It was found in the special verdict, that a certain usage with respect to such policies prevailed amongst the underwriters subscribing policies at Lloyd's Coffee House, and that the policy in question was effected there: but it was not found that the plaintiff was in the habit of effecting policies at that place. The court held that this usage was not sufficient to bind the plaintiff. But that case differs from the present, the question here

being, as to the authority which the plaintiff received. I have said this in order to show my concurrence in the opinions expressed by Lord Denman and Mr. Justice Littledale in the case of Sutton *v.* Tatham, 10 Ad. & E. 27 (E. C. L. R. vol. 37),(*a*) although it is not necessary to determine the same point here, as there was sufficient evidence to show that the defendant knew the usage of the Stock Exchange at Liverpool, if it were requisite to prove it in order to make him liable." I must own I do not quite appreciate the distinction.] Greaves *v.* Legg, 11 Exch. 642,† is more in favour of the defendant's view. There, the defendant, a London merchant, employed a broker at Liverpool to purchase some wool; the broker negotiated a sale by the plaintiff to the defendant of certain bales deliverable at Odessa, "the names of the vessels to be declared as soon as the wools were shipped." In this transaction the broker acted for the plaintiff and defendant. By the *469] custom of Liverpool, *where a contract contained a stipulation that notice of an event should be given by the vendor to the vendee, it was usual for the vendor to give the notice to the broker, who communicated it to the vendee. It was held that the defendant was bound by such usage, and therefore that a notice by the plaintiff (the vendor) to the broker of the names of the vessels in which the wools were shipped was a performance of that stipulation, although the broker omitted to communicate them to the vendee. But that also was a case of contract. [BYLES, J.—Did it appear that the defendants were aware of the usage there?] No. [COCKBURN, C. J.—The case proceeded on the principle that a man is bound to know the usages of the markets in which he deals. WILLIAMS, J., referred to Milward *v.* Hibbert, 3 Q. B. 120 (E. C. L. R. vol. 43), 2 Gale & D. 142.] In Kirchner *v.* Venus, 12 Moore's P. C. Cas. 361, 399, Lord Kingsdown, in giving the judgment of the judicial committee of the Privy Council, says: "The ground upon which it appears to us that this case must be decided in favour of the appellants, is this, that, when evidence of the usage of a particular place is admitted to add to or in any manner to affect the construction of a written contract, it is admitted only on the ground that the parties who made the contract are both cognisant of the usage, and must be presumed to have made their agreement with reference to it. But no such presumption can arise when one of the parties is ignorant of it." [WILLIAMS, J.—Those learned persons express their disapprobation of a decision of this court,—Gilkison *v.* Middleton, 2 C. B. N. S. 134 (E. C. L. R. vol. 89). The case, however, does not involve quite the same principle as the present. It does not follow that one who employs an insurance-broker does not invest him with authority to act as brokers usually act.] The usage relied on here is not applica- *470] ble to all policies made in London, but is limited to a particular *class of underwriters, viz. those belonging to Lloyd's. The mere possession of the policy by Walton & Sons did not authorize them to receive the amount of the loss: Wilkinson *v.* Candlish, 5 Exch. 91.† At all events, they could only have authority to receive the money, not

(*a*) Lord Denman, in that case says,—"I think a person employing one who is notoriously a broker, must be taken to authorize his acting in obedience to the rules of the Stock Exchange." And Littledale, J., says,—"A person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he is himself acquainted with the rules by which brokers are governed."

to set off the amount against a debt of their own. [WILLIAMS, J.—I observe that Maule, J., in the course of the argument in Bayley *v.* Wilkins, 7 C. B. 886, 892 (E. C. L. R. vol. 62), says,—"Scott *v.* Irving, 1 B. & Ad. 605, is the last of a series of cases, beginning with Russell *v.* Bangley, 4 B. & Ald. 395 (E. C. L. R. vol. 6), which went upon the ground of the unreasonableness of paying the debt of one with the money of another, as was said by the court in Todd *v.* Reid, 4 B. & Ald. 210." And Wilde, C. J., in the same case, says,—"I feel some difficulty in saying that a man who buys shares buys subject to the rules of the Stock Exchange, of which he may not be cognisant. And there is this further difficulty, that those rules are framed by, and are to receive their construction from, a body that is totally independent of the rules of law, and irresponsible." BYLES, J.—The inference drawn by the learned author of Smith's Mercantile Law from the case of Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), was this,—"The usage of Lloyd's, being primâ facie only the usage of a single house, will not be binding upon one who cannot be shown to be acquainted with it:" 5th edit. p. 334.] In Stewart *v.* Aberdein, 4 M. & W. 211,† it was assumed that the plaintiff was cognisant of the custom. The authority of that case seems to have been very much questioned in America: see 1 Arnould on Insurance 154, citing Duer on Marine Insurance, Vol. II., pp. 260, 261. In Partridge *v.* The Bank of England, 9 Q. B. 396 (E. C. L. R. vol. 58), the Exchequer Chamber recognise the distinction here contended for. Tindal, C. J., in delivering the judgment of the court, there says,—"It is not necessary to inquire what the effect of a general *immemorial custom in a particular place might be, as this usage is [*471 not so pleaded, but is described as an usage and custom of bankers and merchants used and approved of for divers, to wit, sixty years, according to which dividend warrants pass by delivery without endorsement, and the bonâ holder thereof is entitled to receive the amount from the defendants; which is rather *a practice of trade* than *a custom* properly so called; and such a practice cannot alter the law, by which such an instrument does not confer any right of action on an assignee. It by no means follows from this opinion that mercantile usage, or the practice of particular trades or places, is inoperative. Such usage and practice may have, and often has, an important operation between parties who contract *with the knowledge of its existence*, and with reference to it. See the case of Stewart *v.* Aberdein, and also that of Bartlett *v.* Pentland; in the first of which a practice of brokers and underwriters to settle losses by set-off on [in] account was held binding on a principal who knew of and acquiesced in the practice; and in the second of which a similar practice was held not to be binding on a principal who was not shown to be cognisant of and to have assented to it." [BYLES, J.—That is an expression of opinion by the Exchequer Chamber, in the year 1846, upon the very practice now in question. They hold that it is not binding unless the party is positively proved to have known it.] Precisely so. Thus, besides Todd *v.* Reid, 4 B. & Ald. 210 (E. C. L. R. vol. 6), there are no less than five cases, viz. Bartlett *v.* Pentland, 10 B. & C. 760 (E. C. L. R. vol. 21), Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), Sutton *v.* Tatham, 10 Ad. & E. 27 (E. C. L. R. vol. 37), 2 P. & D. 308, Partridge *v.* The Bank of England, 9 Q. B.

396 (E. C. L. R. vol. 58), and Bayliffe *v.* Butterworth, 1 Exch. 425,† which have decided that the practice or usage in question binds only
*472] those who are shown to be cognisant of it, and therefore may *be presumed to have contracted with reference to it,—all of which this court must overrule before it can make this rule absolute.

James Wilde, Q. C., and *Blackburn*, in support of the rule.—What is the custom here relied on? The merchant or shipowner usually effects an insurance through a broker. The subscribers to Lloyd's transact their business, like the members of the Stock Exchange, in a sort of club-house. The premium is not at once paid by the assured, nor by the broker: the assured gets credit from the broker, and the latter gets credit from the underwriter, with whom he has an open account. On the happening of a loss, an adjustment takes place in the manner described in 1 Arnould on Insurance, p. 119. In a subsequent part of the same volume, p. 196, the learned author, treating of the rights, duties, and liabilities of insurance agents, says,—"Generally, the agent intrusted with the policy after its execution, is the substitute of the assured in all the relations of the latter with the underwriters, and has cast upon him the duty of enforcing the rights and protecting the interests of his principal in all matters arising out of the contract of insurance. Thus, according to the varying circumstances that may arise, he must, where the assured is entitled to it, demand from the underwriters a return of the premium; where a loss has occurred, he must prepare and submit the proof thereof, and settle and adjust the amount, and at the proper time collect and receive the various sums from the underwriters, and pay them over to his principals." In Russell *v.* Bangley, 4 B. & Ald. 395 (E. C. L. R. vol. 6), where the policy had been put into the hands of the broker, as here, for adjustment of a loss, Bayley, J., says,—"When Russell (the assured) left the policy in
*473] the hands of Savery (the broker), he made *him his agent to receive the money from the underwriter." And Holroyd, J., says,—"The delivery of the policy to the broker to settle the loss authorizes him to receive the money due to the assured on the policy. If he had received the money, and afterwards failed, the assured could not have called on the underwriter again, because he would then have paid the money to an agent duly authorized to receive it."(*a*) Bousfield *v.* Creswell, 2 Campb. 545, is a still stronger authority as to the duty of the broker to procure a settlement of the loss from the underwriter. Having dealt with Walton & Sons upon the faith of their being entitled to settle the loss, the defendant has continued to give them credit for further premiums, which but for this settlement he might not have been inclined to do: and so his position has been altered to his prejudice through the conduct of the plaintiff, and the case is brought within the rule laid down in Pickard *v.* Sears, 6 Ad. & E. 469 (E. C. L. R. vol. 33), 2 N. & P. 488, and Freeman *v.* Cooke, 2 Exch. 654.† The judgment of the Exchequer Chamber in Graves *v.* Legg, 2 Hurlst. & N. 210,† is conclusive to show that one who employs an agent to make a contract in a particular market, must be taken to authorize him to make it subject to all the incidents of a contract entered into in that

(*a*) "But," proceeds the learned judge, "the delivery of the policy to the broker to obtain payment does not authorize him to settle the loss in any other way than by receiving the money."

market. There was no evidence there that the party who was held to be affected by the custom had ever heard of it. Cuthbert *v.* Cumming, 10 Exch. 809,† in error 11 Exch. 405,† and Stray *v.* Russell, 28 Law J., Q. B. 279, in error 29 Law J., Q. B. 115, are further instances of the application of this doctrine. [BYLES, J., referred to Clayton *v.* Gregson, 5 Ad. & E. 302 (E. C. L. R. vol. 31), 6 N. & M. 694 (E. C. L. R. vol. 36), *and also to Sykes *v.* Giles, 5 M. & W. 645.†] The counsel for [*474 the defendant, in showing cause against the rule in Stewart *v.* Aberdein, 4 M. & W. 219,† speaking of Todd *v.* Reid, says,—"The court disposed of the case by saying, 'This is in fact an attempt to pay the debt of one person with the money of another.' It is difficult to see how such a conclusion could be applied to such a case. An insurance-broker owes money to the underwriter, and the underwriter to the assured,—is there anything unlawful in an agreement amongst them that the assured shall receive his money from the broker, and take him for his debtor, and that the debt of the broker to the underwriter, and of the latter to the assured, shall both be discharged? It is not like the case where *a servant* is specifically employed to fetch money for his master in specie; this is the case of the employment of an agent, whose creditor, by the very nature of the business in which he is employed, the assured is to become. The strict rule laid down in Todd *v.* Reid is no more applicable to the case of an insurance-broker than to that of a banker. When once the broker makes himself conclusively *the debtor of the assured*, whether by receipt in cash from the underwriters, or by settlement with them in account, that is all the assured has to require." Lord Abinger then interposes with this remark,—"Suppose two merchants have a running account, and one of them desires to increase his credit, and authorizes the other to receive money for him,—does not that mean, to carry it to the account, unless the party specifically directs the contrary? Is it not a question of fact, what the principal means the agent to do?" The counsel then proceed to distinguish Todd *v.* Reid upon the ground urged to-day. And, in delivering the judgment, Lord Abinger says,—"The court is of opinion, that, where an insurance-broker, or other *mercantile agent, has been employed to receive money for [*475 another in the general course of his business, and where the known general course of business is for the agent to keep a running account with his principal, and to credit him with sums which he may have received by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention, and with the authority of the principal." In Story on Agency, § 443, it is said that "the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends farther, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public, or to the other party, as having competent authority, although in fact he has in the particular instance exceeded or violated his instructions, and acted without authority. For, in all such cases, where one of two innocent persons is to suffer, he

ought to suffer who misled the other into the contract by holding out the agent as competent to act, and as enjoying his confidence." Again, in § 84, it is said,—"By far the most numerous cases of agency arise, not from formal or informal written instruments, but from verbal authorizations, or from implications from the particular business or employment of the principal or agent, or from the usual dealings between them, or from the general usages of trade and commerce." "In all such cases (§ 85), whether the agency be of a special nature, or of a general
*476] nature, it may also be *laid down as a universal principle that it includes, unless the inference is expressly excluded by other circumstances, all the usual modes and means of accomplishing the objects and ends of the agency." "So (§ 93), if a person should authorize another to assume the apparent ownership or right of disposing of property in the ordinary course of trade, it will be presumed that the apparent authority is the real authority: for, in such a case, strangers can look only to the acts of the parties, and to the external indicia of property, and ought not to be affected by any mere private communications which pass between the principal and the agent,"—Pickering *v.* Busk, 15 East 38. In § 98 the learned author says,—"In some cases, the nature and extent of the incidental authority turn upon very nice considerations, either of actual usage or of implications of law. Thus, an agent employed to make or negotiate or conclude a contract, is not as a matter of course to be treated as having an incidental authority to receive payments which may become due under such contract. An agent authorized to take a bond, is not to be deemed as of course entitled to receive payment of the money due under that bond. But, if he is intrusted with the continued possession of that bond, an implication of such authority may be deduced from that fact, in connection with the other. So, an agent authorized to receive payment, has not an unlimited authority to receive it in any mode which he may choose; but he is ordinarily deemed intrusted with the power to receive it in money only. So, an agent intrusted to receive payment of a negotiable or other instrument, is ordinarily deemed entitled to receive it only when and after it becomes due, and not before it becomes due. *But, if there be a known usage of trade or course of business in a particular employment, or habit of dealing between the parties,*
*477] **extending the ordinary reach of the authority, that may well be held to give full validity to the act.*" Again, in § 103, it is said that "an agent to insure has, if the policy remains in his hands, an incidental authority to receive payment of losses thereon." And see to the same effect, §§ 109, 191. It is clear, therefore, that the circumstance of the policy being left in the hands of Walton & Sons imposed on them a duty to receive this money; and that the assured would be bound by any known usage of trade as to the mode of payment. In Taylor on Evidence, 3d edit. 165, § 148, it is said: "It may be laid down as clear law, that, if a man deals in a particular market, he will be taken to act according to the custom of that market; and, if he directs another to make a contract at a particular place, he will be presumed to intend that the contract should be made according to the usage of that place.(*a*) Thus, if a person employs a broker on the Stock

(*a*) Citing Bayliffe *v.* Butterworth, 1 Exch. 425, 429,† (per Alderson, B.), 5 Railw. Cas. 288, Pollock *v.* Stables, 12 Q. B. 765 (E. C. L. R. vol. 64), 5 Railway Cas. 352, Greaves *v.* Legg, 11 Exch. 642,† in error, 2 Hurlst. & N. 210.†

Exchange, he impliedly authorizes him to act in accordance with the rules there established; and in such case it matters not whether the principal be himself acquainted with the rules by which such brokers are governed.(*a*) Whether this doctrine would be held to apply in its full force to cases of maritime insurance, may admit of some doubt, as authorities (*b*) are not wanting which, in the language of Lord Wensleydale, 'look the other way.'" (*c*) In Russell *v.* *Bangley, 4 B. & Ald. 395 (E. C. L. R. vol. 6), Abbott, C. J., seemed inclined to [*478 give effect to the usage here relied on. In Bartlett *v.* Pentland, 10 B. & C. 760 (E. C. L. R. vol. 21), the insurance was effected with an Irish insurance company, who had an agency in Lombard Street. [WILLIAMS, J.—That case, as well as Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), established that the usage at Lloyd's is not a general usage: it is not a usage of underwriters generally.] In Bartlett *v.* Pentland, the assured lived at Plymouth: he was not shown to have ever had any dealing at Lloyd's. Here, the assured is a shipowner in London. Lord Tentenden in that case says: "The usage in a particular place, or of a particular class of persons, cannot be binding on other persons, unless those other persons are acquainted with that usage, and adopt it. *Merchants residing in London, and effecting insurances there, may reasonably be supposed to be acquainted with that usage, and to act upon it.*" The presumption meant there was a presumption of law. The defendant was seeking to invoke a usage of Lloyd's when he himself was wholly unconnected with that establishment. Parke, B., alludes to this in his judgment in Bayliffe *v.* Butterworth, 1 Exch. 428.† In Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), the underwriter was not prejudiced by the conduct of the assured: here, he is. The conclusion the Court of Exchequer came to in Stewart *v.* Aberdein, 4 M. & W. 211,† expressly overrules the principle laid down in Todd *v.* Reid, 4 B. & Ald. 210 (E. C. L. R. vol. 6), as applicable to underwriters. [BYLES, J.—Where the usage is known to the plaintiff, as appears from the context.] The language is general. The Lord Chief Baron says,—"The court is of opinion, that, where an insurance-broker or other mercantile agent has been employed to receive money for another in the general course of his business, and where the known general course of business,"—that is, the *course [*479 of business generally known,—"is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood, that, where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal." [COCKBURN, C. J.—How do you get over the case of Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), which seems to be a direct

(*a*) Sutton *v.* Tatham, 10 Ad. & E. 27 (E. C. L. R. vol. 37), 2 P. & D. 308, Bayliffe *v.* Butterworth, 1 Exch. 426,† Pollock *v.* Stables, 12 Q. B. 765 (E. C. L. R. vol. 64), Bayley *v.* Wilkins, 7 C. B. 886 (E. C. L. R. vol. 62), Taylor *v.* Stray, 2 C. B. (N. S.) 175 (E. C. L. R. vol. 89).

(*b*) Bartlett *v.* Pentland, 10 B. & C. 760 (E. C. L. R. vol. 21), Gabay *v.* Lloyd, 3 B. & C. 793, 5 D. & R. 641 (E. C. L. R. vol. 16).

(*c*) Bayliffe *v.* Butterworth, 1 Exch. 428.†

authority?] That was a question of construction of the contract, between which and the case of an authority given to an agent to deal in a particular market there is a manifest difference. You cannot override the express terms of a written contract by superadding the usage of a particular place. [COCKBURN, C. J.—It was there sought to construe the contract by the usage at Lloyd's; but the court said that was only the usage of a particular place, and that, unless it were shown that the plaintiff had knowledge of the usage, he would not be affected by it."] The true principle, to be deduced from all the cases, is, that, if the usage be general, the party is presumed to know it, but that, if it be a particular or a local usage, his knowledge of it must be shown by evidence. In construing a contract, you have to ascertain the intention of the parties: but, in the case of an authority, the principal is bound by his act of employing a person whose known course of business is such as to give him authority to do what he does. The business transacted upon the Stock Exchange is not of more large and general interest and importance than that which is transacted at Lloyd's. [BYLES, J.—The *480] *Stock Exchange is the only market for the purchase and sale of government securities. COCKBURN, C. J.—An insurance-broker does not confine his dealings exclusively to Lloyd's.] No: but every insurance-broker deals at Lloyd's. The circumstance that Walton & Sons were allowed to make the policy in their own names is not unimportant: Koster *v.* Eason, 2 M. & Selw. 112, cited in 1 Arnould on Insurance 133.

COCKBURN, C. J.—I am of opinion that the rule in this case should be discharged. I quite concur in the first point contended for by the defendant's counsel, that, the policy remaining in the hands of the brokers, the plaintiff is estopped from saying that it was not in their hands with authority to collect. Then arises the question whether this is to be interpreted according to the general rule of law, as an authority to collect by the receipt of the money, or whether the usage at Lloyd's that the collection may be made by setting off the loss on the policy against a debt due from the brokers to the underwriter is to control the rule of law. It is not disputed that, in general, an agent with authority to receive must be taken to have authority to receive in cash only, and not by means of a set-off of his own debt against the debt due to his principal. The question, therefore, in the present case, is, whether the rule of law can be controlled by the usage at Lloyd's; and, as to that, I am of opinion that we are bound by positive authority. Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), is a decision directly in point. There, the same question as to usage arose as in the present case, and the court held that the claim was not answered by a defence substantially the same as that here set up. Lord Tenterden says: "The general rule is, that a broker is the debtor of the underwriter for the pre-*481] miums, and the underwriter the debtor of the assured *for the loss. If the usage relied upon in this case were allowed to prevail, it would have the effect of making the broker, and not the underwriter, the debtor to the assured for the loss. Such usage, however, can be binding only on those who are acquainted with it, and have consented to be bound by it." The language of Parke, J., is equally clear. "The authority of the broker," he says, "is prima facie to receive payment in money. Mitchell, therefore, was the agent of the assured to receive

payment from the underwriter in cash, or that which was equivalent to payment in cash. A special authority may be given by the assured to the broker to receive payment in some other mode, and such authority may be inferred from facts or from some usage to which the assured has assented: and here there is some evidence of a usage prevailing between the broker and the underwriter; but the plaintiff was not cognisant of that usage, for, he states in one of his letters that this was the first total loss he ever had experienced." The decision of the Court of Queen's Bench, therefore, in that case, was, that, in the absence of knowledge of such usage, the right of the assured to recover from the underwriter must prevail. Now, in the present case, it is not left as a matter of inference that the assured had not knowledge of any such usage; but there is positive proof that he was not cognisant of it: so that the case is brought precisely and pointedly within the principle of Scott *v.* Irving. It has, however, been contended by Mr. *Wilde*, for the defendant, that the case of Scott *v.* Irving is virtually overruled by Stewart *v.* Aberdein, 4 M. & W. 211.† But, when the case of Stewart *v.* Aberdein is looked at, it will be found, that, although the court held that there was evidence there of a usage prevailing amongst brokers and underwriters to make settlements in account by taking credits as payments, *and that, where a settlement had taken place according to that known [*482 usage, the underwriter was discharged; still it was there assumed that such usage was known and assented to by the assured. It is true that the evidence of his having had such knowledge was unsatisfactory: nevertheless, the court could not have arrived at the result they did without coming to the conclusion that the assured had knowledge of the custom. I cannot, therefore, consider the case of Stewart *v.* Aberdein as overruling Scott *v.* Irving; but, on the contrary, it rather seems to me to confirm it. That being so, Scott *v.* Irving stands as an authority which is not overruled, and we are bound by it. The duty of setting it right, if it be a wrong decision, must be left to a court of error.

WILLIAMS, J.—I am entirely of the same opinion. I am not inclined to dispute the proposition, that, when a broker is employed to buy in a particular market, he is authorized to buy according to the usage of that market. That proposition was confirmed by the decision of the Exchequer Chamber in Graves *v.* Legg, 2 Hurlst. & N. 210.† That rule is not confined to the case of purchasing, but applies to an authority generally to deal in the market. Then, the question arises, is Lloyd's a market within that rule? As to that, the case of Gabay *v.* Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16), is a distinct authority that the usage at Lloyd's is not such a general usage as to bind a person unacquainted with its existence. But it is said, that, in Gabay *v.* Lloyd, the question was as to the construction of a contract, and not as to the authority given to the broker: and certainly it does appear that a distinction to that effect was taken by Lord Wensleydale in Bayliffe *v.* Butterworth, 1 Exch. 425, 428;† but I do not understand how it can be reconciled with previous *authorities. [*483 In the present case, however, I think we are precluded from deciding differently by the case of Scott *v.* Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), which is, as to this particular usage, precisely in point; and I do not see how the defendant can get out of it. But it is contended on his behalf, that here, after the settlement with Walton &

Sons, the defendant had given fresh credit for premiums. That is rather matter of hardship; but it is not a matter which constituted any part of the view the court took in Scott *v.* Irving. What the court said in that case was, in effect, that, if, after the assured had knowledge of the usage, he acquiesced in it, he would be bound,—Lord Tenterden saying, that, if, after such knowledge, the relative situation of the underwriter and broker had been changed, as, if the underwriter, on the supposition that the loss had been paid by the allowance in account, had given the broker fresh credit for other premiums, he probably would have come to a different conclusion from that which he did in that case. In Arnould on Insurance, 2d edit. p. 149, it is said: "Lord Ellenborough, in a case that came before him at Nisi Prius, and Lord Tenterden, in the two earliest cases of the same kind that presented themselves for decision in the Court of King's Bench, seemed to consider that the authority given by the assured to the broker was only to receive losses from the underwriter in money; and that, therefore, nothing but actual cash payment by the underwriter to the broker, or a credit given to the underwriter by the assured himself, could estop the assured, in case of the broker's insolvency, from recovering against the underwriter." But the learned author adds,—"Lord Tenterden, however, subsequently admitted, and the rule of law undoubtedly now is, that, if the assured, upon the whole facts of the case, can be shown to have been
*484] cognisant of the usage of settling *losses in account, at the time he procured the insurance to be effected, he shall be bound by it; and the fact that a loss has been passed in account according to the usage between broker and underwriter, shall preclude him from recovering such loss from the latter on the insolvency of the former. The question, then, as to the right of the assured to recover from the underwriter in these cases, is now reduced to a pure question of evidence, and depends solely upon the point whether the assured, upon the whole facts, must not be taken to have been cognisant of the custom." That is the view taken by the pleader who drew the pleas in this case; for, they are not founded on a general custom, but on the usage at Lloyd's; and the third and fourth pleas aver that the plaintiff had notice of the usage. When a case is established of a usage at a place, generally known to all persons conversant with business there, it is very cogent evidence that such persons had notice of the usage: still, it is only a question of degree; and the whole matter would have to be left to the jury. Here, the pleas have failed, because the jury could not, on the evidence, find that the plaintiff had knowledge of the usage set up.

WILLES, J.—I am of the same opinion. As a general rule, when a person employs an agent to receive a debt, the agent must receive it in money, and it is not sufficient that the debt should be written off against a debt due from such agent. The rule is to be found laid down by Alderson, B., in Barker *v.* Greenwood, 2 Y. & C. 414.† In the present case, it is said that such a mode of payment is allowed by the usage of the place where the settlement is made. But I apprehend that that is not sufficient to make the transaction valid, unless there has been previous notice to the creditor of such usage. Therefore, according to the
*485] authorities which have been referred to, *I am of opinion that the defendant is in the wrong, and that the verdict which has been entered for the plaintiff is right.

BYLES, J.—I entirely accede to the proposition, that, when Walton & Sons were intrusted with the policy, they were entitled to receive the money under it from the defendant. The policy was the title-deed, which they had no authority to hand over to the defendant without receiving payment. On that point, I agree with the view taken by the defendant's counsel. But, on the other hand, I think the plaintiff gave Walton & Sons no authority to settle the loss in the way they did. It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that he is to receive it in cash. If the agent receives the money in cash, the probability is that he will hand it over to his principal: but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over: at all events, it would very much diminish the chance of the principal ever receiving it; and, upon that principle, it has been held that the agent, as a general rule, cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money. Then, what is the usage relied on to take this case out of that general rule? It is not the usage of London, but the practice of keeping accounts adopted at a particular place. It does not fall within the description of a general custom or usage, but it is only the usage at a particular place,—of a particular counting-house, I may say. Independently, therefore, of any authority upon the subject, I should have thought it would have been necessary to have brought knowledge of such usage home to the plaintiff before he could have been affected *by it. [*486
In addition to the authorities which have been cited, I may observe that Mr. Smith, in his work on Mercantile Law, 6th edit. p. 347, says,—"The usage of Lloyd's, being primâ facie only the usage of a single house, will not be binding upon one who cannot be shown to be acquainted with it." Then there have been three cases at least(*a*) in which it has been held that the principal is not affected unless he be shown to have been cognisant of the usage. Upon principle, therefore, as well as upon authority, I think that the brokers in the present case had authority from the plaintiff to receive the loss only in cash. It was urged by Mr. *Wilde* in the course of his argument, that there was here an apparent authority for the brokers to receive a settlement in the way they did. That apparent authority, however, must be derived from the principal: and it still brings it back to the question whether the latter ever knew, or was blameable for not knowing, the usage. Upon principle and authority equally, I think this rule ought to be discharged.

Rule discharged.(*b*)

(*a*) Todd v. Reid, 4 B. & Ald. 210 (E. C. L. R. vol. 6), Scott v. Irving, 1 B. & Ad. 605 (E. C. L. R. vol. 20), and Gabay v. Lloyd, 3 B. & C. 793 (E. C. L. R. vol. 10), 5 D. & R. 641 (E. C. L. R. vol. 16).

(*b*) An appeal is pending.

*487] *HEMMING v. HALE and Another. *Nov.* 9.

An attorney having obtained judgment against B., at the suit of A., employed W., another attorney, to sue out execution. W. accordingly sued out a ca. sa. against B, under which he was taken in execution. B. prevailed upon the sheriff's officer to discharge him, upon his paying him the debt and costs, 45*l.* 2*s.* One F., a clerk of W. (with, as the jury found, W.'s concurrence), received 20*l.* of the money from the officer.

In an action against the sheriff for the voluntary escape, the defendant paid 25*l.* 5*s.* into court and pleaded payment of the 20*l.*:—Held,—Byles, J., dissentiente,—that the payment to F., being a payment to W., the defendant was entitled to a verdict,—the plaintiff having sustained no damages by reason of the escape, beyond the sum paid into court.

THIS was an action against the sheriff of Middlesex, for an escape.

The first count of the declaration stated that the plaintiff, in the Court of Queen's Bench, by the judgment of the said court, recovered against one Thompson a certain sum of 56*l.* 8*s.* 6*d.*, and for having execution sued and prosecuted out of the said court a certain writ of our lady the Queen called a capias ad satisfaciendum upon the said judgment against Thompson, directed to the sheriff of Middlesex, by which said writ our said lady the Queen commanded the said sheriff that he should take the said Thompson, if he should be found in his bailiwick, and him safely keep so that the said sheriff might have his body before our said lady the Queen at Westminster immediately after the execution thereof, to satisfy the plaintiff the sum aforesaid; which said writ was, before the delivery thereof to the said sheriff to be executed, endorsed with a direction as follows,—"Take to satisfy 43*l.* 11*s.* 10*d.* and interest thereon at 4*l.* per cent. per annum from the 25th of September, 1858, until payment, besides officer's fees and other legal expenses, and 1*l.* 10*s.* for costs of execution," &c.; and which said writ so endorsed as aforesaid was delivered to the now defendants, who were and still are sheriffs of Middlesex, and who by virtue of such writ took and arrested the said Thompson by his body, and detained him in custody in execution for the said sum and interest so endorsed on the said writ, and 1*l.* 10*s.* for costs of execution, and kept and detained him in *488] such *custody until afterwards and before the commencement of this suit the defendants, so being such sheriff, without the leave or license and against the will of the plaintiff, permitted the said Thompson to escape and go at large wheresoever he would out of the custody of the now defendants, whereby the plaintiff lost and had been deprived of his aforesaid sum and interest and 1*l.* 10*s.* costs of execution so endorsed on the said writ of execution as aforesaid, and was otherwise injured, &c.

There was also a count for money received by the defendants to the use of the plaintiff.

The defendants pleaded,—first, except as to 20*l.*, payment into court of 25*l.* 5*s.*,—secondly, as to 20*l.*, payment before action.

The plaintiff took issue on the second plea, and, as to the first, replied damages ultrà.

The cause was tried before Crowder, J., at the sittings in London after last Hilary Term. The facts which appeared in evidence were as follows: The plaintiff had employed one Robertson as his attorney to sue one Thompson. Having obtained judgment against Thompson, but not being desirous of issuing execution in his own name, Robertson got another attorney named Winter to do so, and Winter, on the 28th of

September, 1858, sent the writ by the hand of one Fox, his clerk, to one Willis, an officer of the defendants, endorsed to satisfy 43*l.* 11*s.* 10*d.* and interest, and 1*l.* 10*s.* for costs of execution. The writ was not executed until the 26th of October, on which day Thompson was taken to Willis's lock-up house. Throughout the proceedings Fox was the only person with whom Willis had any communication upon the subject of the execution. Thompson remained in custody until the 29th of October, his attorney in the meantime making unavailing efforts to find either the plaintiff or Winter *for the purpose of paying the debt and costs. Under these circumstances, Thompson being extremely ill, Willis, the officer, consented to receive the debt and costs, amounting to 45*l.* 2*s.*, and to discharge Thompson. [*489

On the following day, viz. the 30th of October, Fox called at Willis's office; and, finding that the money had been paid, asked Willis to hand it to him. This Willis declined to do without Winter's receipt; but ultimately, upon Fox's representation that Winter was out, and that the plaintiff was in want of the money, Willis paid Fox 20*l.* on account, with which the latter absconded.

Winter a few days afterwards called at the office of Willis, and demanded the whole proceeds of the execution, repudiating Fox's authority to receive any part of it.

On the 10th of November the sheriffs were ruled to return the writ, whereupon they returned that they had arrested Thompson, who had paid the sum endorsed on the writ, that they had paid 20*l.* to the plaintiff, and held the balance ready to hand over to him. The plaintiff thereupon sued the sheriffs for the escape.

The learned judge left it to the jury to say,—first, whether the plaintiff authorized Robinson, and Robinson authorized Winter, to receive the debt and costs,—secondly, whether Fox was authorized either by Robinson or Winter to receive the 20*l.* As to the first question, he observed that there could be little doubt that Winter was duly authorized to get the money, and that a payment to him would be a payment to the plaintiff; and, as to the second, that, although the mere fact of Fox being Winter's clerk would not confer upon him authority to receive the money from the sheriff, it would be for them to say whether Fox had authority *expressly conferred on him for that purpose, or whether his act had been subsequently ratified by Winter. [*490

The jury found that the plaintiff authorized Winter to receive the money, and that Winter authorized Fox. A verdict was thereupon entered for the defendants.

Griffits, in Easter Term last, obtained a rule nisi for a new trial on the ground of misdirection and that the verdict was against evidence. He submitted that the officer was not authorized to receive the money, and that the discharge of the debtor was in point of law an escape,—Connop *v.* Challis, 2 Exch. 484;† Woods *v.* Finnis, 7 Exch. 363;† that the authority of the attorney on the record was limited to the receipt of the debt and costs from the debtor, and did not warrant him in accepting from the sheriff satisfaction for the escape; and that, even assuming that Winter had authority to receive the money, he had no power to delegate that authority to another.

Hawkins, Q. C., and *Quain*, showed cause.—That there was an escape, cannot be denied: the only question is whether the plaintiff has

thereby sustained any damage beyond the sum paid into court; and that depends upon whether the payment to Fox was an authorized payment. That was a question of fact, which is disposed of by the finding of the jury. That the attorney who has the conduct of the suit may receive the money is clear from the cases of Savory *v.* Chapman, 11 Ad. & E. 829 (E. C. L. R. vol. 39), 3 P. & D. 604, and Connop *v.* Challis, 2 Exch. 484.† [BYLES, J.—Yes, from the debtor. But, may he receive it from *the sheriff* after the escape of the debtor?] If he might receive it from the party, there can be no reason why he should not receive it from the officer. If the whole amount of the levy has
*491] reached the hands of the plaintiff, or those of an *authorized agent of the plaintiff, there is an end of the question. Now, a payment to Winter, the attorney intrusted with the issuing of the execution, would clearly be a good payment: and Fox being authorized (as the jury have found) by Winter to receive the money for him, the sum paid to Fox has in truth been paid to Winter. Formerly, the shoriff was liable to an action of debt for an escape, as well as to an action upon the case: but now, by the 31st section of the 5 & 6 Vict. c. 98, it is enacted, "that, if any debtor in execution shall escape out of legal custody after the passing of this act, the sheriff, bailiff, or other person having the custody of such debtor shall be liable only to an action upon the case for damages sustained by the person or persons at whose suit such debtor was taken or imprisoned, and shall not be liable to any action of debt in consequence of such escape:" see Regina *v.* The Sheriff of Leicestershire, 11 C. B. 367 (E. C. L. R. vol. 73); Arden *v.* Goodacre, 11 C. B. 371. It was competent to the attorney to give an order for the discharge of the debtor: 15 & 16 Vict. c. 76, s. 126. It may be conceded that Winter had no authority to receive money in satisfaction of the plaintiff's claim in an action against the sheriff for the escape. But, the 20*l.* paid to Fox was a payment in the original action. Suppose, after the escape, Thompson, the debtor, had met Winter, and had paid him the amount of the debt and costs,—would not that have been a good payment? If so, might not Willis, the officer, be the agent of the debtor to pay the money? [BYLES, J.—The sheriffs may receive the debt and cost on a fi. fa., but not on a ca. sa.: Woods *v.* Finnis, 7 Exch. 363.†] That is conceded. [BYLES, J.—The sheriff cannot retake the debtor after a voluntary escape: Arch. Pr. 10th edit. 662.] No: but the *plaintiff* may. [ERLE, C. J.—No doubt
*492] the plaintiff can take him again,—certainly *in another county; and, my brother Williams thinks, in the same county also.] The distinction is between the plaintiff and the sheriff. [BYLES, J.—In the note in the margin of the case of Allanson *v.* Butler, 1 Sid. 330, it is said, that, upon a negligent escape, the sheriff or the party may retake the debtor, but that, if the escape is voluntary, the party only can retake him. WILLIAMS, J.—The sheriff cannot purge his wrongful act by a recapture.] The only question here is, whether a payment to Fox, who was acting in the matter of the execution as Winter's clerk, was not equivalent to a payment to Winter himself. It is submitted that it was, and consequently that the finding of the jury conclusively negatives the plaintiff's right to recover in this action beyond the amount paid into court.

Griffits and *Lawrance*, in support of the rule.—The question is, what

damages is the plaintiff entitled to recover against the sheriff for the escape. [CROWDER, J.—If the plaintiff had received 20*l.* before action, could he be said to have sustained greater damages by reason of the escape than the sum paid into court?] The payment made to Fox has no reference to the action for the escape. [ERLE, C. J.—What more can the plaintiff be entitled to recover than the 45*l.* 5*s.*?] If the plaintiff had recovered the full amount against the sheriff, he might still issue a ca. sa. against the debtor and recover it again from him, and the sheriff would have no claim to the money. [ERLE, C. J.—Do you find any case where the plaintiff has been so fortunate as to recover his debt twice in that way?] No: but the two rights are totally distinct. The authority of the attorney is limited: all he is justified in doing, is, to discharge the debtor upon receiving the money from him. The duty of the sheriff is equally clear. In Slackford *v.* Austin, 14 East 468, it was held, that, if, *upon the execution of a writ of ca. sa., which [*493 requires the sheriff to take *and keep* the body so that he may have it on the return day of the writ at Westminster, to satisfy *the plaintiffs* of their damages and costs, the sheriff before the return-day receive the money due from his prisoner, and thereupon liberate him before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape; and his return under the common rule of cepi corpus and that he detained the prisoner until he satisfied *him* (the sheriff) the levy-money endorsed on the writ, which he had ready as commanded, &c., is of no avail. The attorney upon the record is only authorized to discharge the debtor, on receipt of the money: Savory *v.* Chapman, 11 Ad. & E. 829 (E. C. L. R. vol. 39), 3 P. & D. 604. [WILLIAMS, J.—It seems to be well established that payment to the attorney on the record is a good payment: Crozer *v.* Pilling, 4 B. & C. 26 (E. C. L. R. vol. 10), 6 D. & R. 129 (E. C. L. R. vol. 16).] No doubt, provided the payment is before the debtor's discharge. But the payment subsequently made does not purge the escape: Langton *v.* Wallis, 1 Ld. Raym. 399, Lutw. 587; Connop *v.* Challis, 2 Exch. 484.† However small the damages for the escape may be, they cannot be taken in reduction of what is due to the plaintiff on the judgment. In Woods *v.* Finnis, 7 Exch. 363, 371,† Parke, B., in delivering the judgment of the court, says: "If the sheriff's officer permits the defendant to go at large on paying to him the sum mentioned in the writ, the sheriff would be liable for an escape; for, it is a neglect of duty by the officer, seeing that the writ commands the sheriff to have the body of the debtor at the return *to satisfy the plaintiff* and not *to pay* the debt to the sheriff; and in that respect his duty upon the ca. sa. differs from that under a fi. fa., by which the sheriff is directed to make a sum out of the goods and chattels of the defendant, and *himself* to *have [*494 that money at the return; so that, in the latter case, the defendant is discharged by payment to the sheriff, and the sheriff becomes debtor to the plaintiff; in the former, he is discharged by payment to the plaintiff alone; and the sheriff, by receiving the money, has no right to substitute his responsibility for that of the debtor, whose body the creditor has a right by law to keep until the debt is paid to him. The authorities are very full and clear upon this point: Tailer *v.* Baker, T. Jones 97, 2 Lev. 203, nom. Taylor *v.* Bekon; Slackford *v.* Austen, 12 East 468; Stringer *v.* Stanlack, Cro. Eliz. 404." In the present

case, the attorney upon the record was Robinson. He employed Winter to sue out the execution. Winter thus became a limited agent. [WILLIAMS, J.—If the debtor had tendered the debt and costs to Winter, and he had refused to receive the money and give a discharge, would not that have given Thompson a right of action against the plaintiff, Robinson, and Winter?] No doubt it would. [BYLES, J.—Winter was the attorney on the record within the 126th section of the 15 & 16 Vict. c. 76.] Winter had no authority to interfere after a new state of things had arisen,—after a right of action had accrued to the plaintiff for the escape. [ERLE, C. J.—Might not Winter have issued a fresh capias?] There was no evidence that he had any further authority than to issue the particular ca. sa. But, assuming that Winter was authorized to receive the money, he clearly had no power to delegate that authority to Fox. If the payment of the 20*l.* had taken place at Winter's office, the case might have been different. [CROWDER, J.—We must assume that authority was given by Winter to Fox.] Or a subsequent ratification. An attorney employed in this way, has no right to delegate to another the power to receive the money. [WILLIAMS, J.—The maxim "Delegata potestas non potest delegari" *has been very much misapplied. Where it is perfectly indifferent whether the act is done by the hand of the agent or by another, the authority may be implied: see the observations of Maule, J., in Lord *v.* Hall, 8 C. B. 627 (E. C. L. R. vol. 65). It was perfectly indifferent here whether the money was received by Winter himself or by some person employed by him. In either case, Winter would be responsible for it.] *Cur. adv. vult.*

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ERLE, C. J.—I am of opinion that this rule must be discharged. The facts which appeared in evidence were substantially these:—The plaintiff, having recovered a judgment against Thompson through the agency of Robinson, one Winter was appointed as his attorney in the action in lieu of Robinson, to issue execution; and Winter accordingly sued out a ca. sa. Winter, then, having authority to issue execution, had by law authority to receive the money to be levied under the execution; and I take it that he would have authority and would be bound to receive the sum endorsed upon the writ if tendered to him before the arrest of the debtor under it, and that he would have rendered himself liable to an action, and probably his client also, if he had refused to receive it. If Winter had authority to receive the whole of the judgment-debt, I am of opinion that his authority would also extend to the receipt of a portion of it. I am further of opinion, that, if the sheriff had arrested the debtor for the amount endorsed on the writ, and there had been a voluntary escape, it would have been competent to Winter to issue another ca. sa. against him into another county. The authority given to Winter was, to obtain satisfaction of the judgment by getting the money or taking the body of the debtor. The effect of the evidence is, that the debtor was arrested under the *ca. sa. and permitted to escape, and that afterwards the debtor, by the hand of the sheriff's officer, who was his agent for this purpose, paid Winter, the attorney authorized by the plaintiff to issue the execution and to receive the debt and costs, the sum of 20*l.* in part payment of the amount which the sheriff was directed by the writ to levy. I am of opinion that this payment by the sheriff's officer to Winter was just the same as if Thompson the debtor had by his own hand paid the 20*l.* to Hemming

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himself: and, if Hemming had received the 20*l.*, and afterwards brought an action against the sheriff for the escape, the proper measure of damages would have been the difference between that sum and the amount directed to be levied by the writ; and that being covered by the amount paid into court, the whole claim of the judgment-creditor is satisfied. I have hitherto assumed that Winter, the attorney authorized to issue the execution, had authority to receive and did receive payment of the 20*l.* But it has been contended that Winter was appointed the plaintiff's attorney for the purpose of issuing this particular capias only; and, further, that, assuming that a payment to Winter would have been a good payment, the payment to Fox was not. I see no reason why the authority of Winter should be limited to the particular writ: his substantial duty was to take all necessary steps for obtaining satisfaction of the judgment. If, then, the 20*l.* had been received by Winter, it clearly would have bound Hemming. A great deal has been said about the second of these propositions, viz., that the payment to Fox (who it is found by the jury acted under the authority of Winter) was not a payment to Hemming; for that Winter had only a special limited authority, and that the maxim "delegata potestas non potest delegari" is applicable here. But I am of an entirely different opinion. Winter was the attorney *employed by Hemming to issue the execution; and, in the ordinary conduct of business, an attorney must necessarily [*497 authorize his clerks to receive moneys and to do many other acts for him and in his name. It would be introducing a most pernicious doubt to hold that these acts of the clerk are not binding upon the attorney and upon his client. The attorney is responsible: and it must in most cases be a matter of utter indifference whether the thing is done by his own hand or by that of a clerk. I am clearly of opinion, that, Fox being authorized by Winter, the receipt of the money by him was a receipt by Winter, and so binding upon Hemming. And I come to this conclusion with the more confidence because the question is who is to lose by the wrongful act of Fox. Now, the plaintiff authorized Winter to receive the debt, and Winter authorized Fox. If the creditor had received the money himself, I do not think he would have had the audacity to sue the sheriff for the escape, and so seek to recover his debt twice. I think it would be gross oppression on the sheriff if he were made the loser, seeing that he has in no way been guilty of any breach of duty. The judgment-debtor and the sheriff were both diligently seeking the attorney,—the former being ready to pay the sum due upon the judgment, and his health suffering materially from his detention. Under these circumstances, the sheriff very humanely took upon himself the risk of letting the defendant out upon his depositing the money: and I am not disposed to cast upon him the loss of the 20*l.* received by Fox.

WILLIAMS, J.—I am of the same opinion. The jury having found that Fox was authorized by Winter to receive the 20*l.*, I think we are bound to treat the receipt of the money by Fox as identical with a receipt by Winter: and, further, I am of opinion, that, if the *money had been received by Winter, that would have been a [*498 receipt by Hemming himself, and would have gone in mitigation of the damages he might have been entitled to recover by reason of the escape. Winter having been employed by Hemming, I do not see that

his right to employ a clerk to perform part of his duty is at all affected by the maxim "delegata potestas non potest delegari." Where a man employs an agent, relying upon his peculiar aptitude for the work intrusted to him, it is not competent to that person to delegate the trust to another. But, where the act to be done is of such a nature that it is perfectly indifferent whether it is done by A. or by B., and the person originally intrusted remains liable to the principal by whomsoever the thing may be done, the maxim above referred to has no application. Here, it was a matter of perfect indifference to the plaintiff, Hemming, whether the money due to him upon the judgment against Thompson was received by Winter or by his clerk. The receipt by Fox, then, being a receipt by Winter, the question is whether that binds the plaintiff. Now, it has been established by many cases which are referred to in Crozer *v.* Pilling, 4 B. & C. 26 (E. C. L. R. vol. 10), 6 D. & R. 192 (E. C. L. R. vol. 16), and by that case itself, that, if the judgment-debtor had remained in custody, a tender of the debt and costs to Winter would have been the same as a tender to Hemming; and, if Winter had upon that tender refused to discharge the debtor from custody, both he and his client Hemming would have been liable to an action. So, I take it to be equally clear, that, if, before the writ had been executed, the money had been paid or tendered to the attorney intrusted with the execution, and the debtor had afterwards been taken on the ca. sa., an action would have lain against the attorney or against the client. The question is whether the same principle does not apply where the debtor
*499] has *been taken upon the ca. sa., and the sheriff has allowed him to escape. The reason why a payment or a tender to the attorney is considered as a payment or tender to the client, is, that it is impossible in all cases to find the client, so as to make the payment or tender to him personally. The consideration of the great hardship and difficulty which would be imposed upon the defendant by requiring the payment or tender to be made to the plaintiff himself, has led to the attorney's being in this respect treated as if he were the client himself. Now, here, when the debtor had escaped, the duty and functions of the attorney employed to carry out the judgment were by no means over. It is clear that there are steps which the attorney has the means of taking and is bound to take still further to enforce the execution; for instance, if the debtor has escaped into another county, it is the attorney's duty to issue a fresh ca. sa. If it be the duty of the attorney to go on with the execution, it must also be his duty upon a proper occasion to hold his hand. It cannot be disputed that the attorney would be bound to receive the debt and costs after the escape, if duly tendered to him by the judgment-debtor. According to Mr. *Griffits's* argument, the execution must go on until the judgment-creditor himself is found and the money paid to him: but that, as I have already observed, is so fraught with inconvenience and hardship as to be practically impossible. It seems to me that the same reasoning which establishes that the attorney intrusted with the execution is bound to take all necessary steps to enforce it, also shows that he has an implied authority to hold his hand if circumstances should arise which make it right that the execution should not go on: and his duty and authority in this respect must be the same whether before or after the discharge of the debtor

from *custody. It seems to me, therefore, to be abundantly clear, upon principle as well as upon authority, that Winter was [*500 authorized to receive this money, and that his receipt of it was identical with a receipt of it by the client himself. But it is further urged by the counsel for the plaintiff, that the payment of the 20*l.* took place after the escape of Thompson, when the plaintiff had a vested right of action against the sheriff, the true measure of the damages in which was the value of the body of the debtor at the time of the escape; and that nothing which has happened ex post facto can alter that measure. Justice clearly would be defeated by the application of any such rule in this case. As a general proposition, no doubt, the true measure of damages against the sheriff for an escape, is, the value of the body of the debtor at the time; but I apprehend that, if the debt and costs be afterwards paid, that might be given in evidence in mitigation of damages. We have a familiar instance of this in the action of trover. In 1 Rolle's Abridgment 5, (L) pl. 1, it is said: "Si home prist mon cheval, et ceo chevaucha, et puis ceo redeliver al moy, uncore jeo poio aver cest action vers luy; car ceo est un convercion, et le redelivery nest ascum barr del action, mes solement serra un mitigacion de damages." I do not see why the jury might not in assessing the damages here look at the fact of the debt due from Thompson having been reduced by the 20*l.* paid to Winter through Fox, and give the sheriff the benefit of that payment. And if so, the 25*l.* 5*s.* paid into court was sufficient to cover all the plaintiff was entitled to recover. For these reasons, I concur with my Lord Chief Justice in thinking that this rule should be discharged.

Byles, J.—I am of opinion that the rule should be made absolute, though it is with much deference and reluctance that I differ from my Lord and my learned *Brothers. Although it is clear that the [*501 sheriff has paid a sum of 20*l.*, it is also clear that the money has not been personally received by the plaintiff: somehow or other he has fallen through. The first question is, whether the payment to Fox was a payment to Winter. I must confess that I am unable to appreciate the argument of Mr. *Griffits* upon this part of the case: it seems to me to be perfectly clear that a payment to the attorney's clerk is a payment to the attorney. But the great question is, whether Winter had authority to receive the money. It is not pretended that he had any special authority. If he had any authority at all, it was an authority conferred on him by the law. If Winter had been the sole person charged with the execution, the authority conferred on him by the law was simply to receive the debt and costs from the debtor, and thereupon and thereafter to discharge him from custody. Here, Winter received the money from the sheriff after the debtor had been suffered to escape. The plaintiff then had a double remedy,—against the debtor upon the judgment,—and against the sheriff for the escape; and it by no means follows that the measure of damages would be the same in both actions. Put the case of the action against the sheriff. There, the measure of damages would be the value of the body of the debtor at the time of the escape: see Arden *v.* Goodacre, 11 C. B. 371 (E. C. L. R. vol. 73). Suppose it appeared in evidence that the debtor was ill and likely to die, the jury might think 40*s.* enough; or they might think his state more hopeful, and give the plaintiff damages to the amount of the debt

and costs in the action in which the escape took place. Whether they give more or less can make no difference in principle. Or, suppose the debtor were hopelessly insolvent at the time of the escape, and consequently the value of his custody to the creditor was merely a nominal sum, and the next day he had a legacy of 1000*l.* left to him! It *502] *seems to me that Mr. *Griffits* is quite right when he says that the creditor's remedy upon the judgment is not gone by a recovery against the sheriff in an action for the escape; though probably the court would, in case he attempted to enforce it, interpose to prevent him from recovering a double satisfaction. Here, Winter, instead of confining himself to the duty which his position cast upon him of receiving the money from the debtor, and thereupon and thereafter discharging him from custody, does that which I think the law did not authorize him to do, viz., receive the money from the sheriff. Upon the authorities which have been cited, it is quite clear that the sheriff is not the agent of the execution-creditor to receive the debt and costs from the debtor and give him a discharge. Was Winter acting as the agent of the plaintiff in receiving the money from the sheriff? I think not. Every man is bound to know the law: and the sheriff must be taken to have received the money, and to have paid a portion of it over to Winter, with full knowledge that the law did not warrant him in receiving it, and that Winter was acting beyond the scope of his authority in taking it from him. For these reasons, it appears to me that the rule for a new trial should be made absolute.

CROWDER, J.—This being a complaint against the propriety of my direction, I confine myself to expressing my entire concurrence in the judgments pronounced by my Lord and my Brother Williams. They have so fully and so clearly expressed the opinion which I entertain that I need not repeat it: and I am not at all shaken in that opinion by the dissent expressed by my Brother Byles. Rule discharged.(*a*)

(*a*) An appeal is pending.

*503] *BROOM *v.* HALL and Another. *Nov.* 3.

A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff,—Held, that A. was entitled to recover the costs.

THE plaintiff, a broker at Liverpool, made a contract for the purchase of goods for the defendants, who were merchants there. The defendants having refused to accept the goods, the sellers brought an action against the plaintiff, which the latter (the now defendants repudiating all liability on the contract) defended, but unsuccessfully. The plaintiff thereupon brought this action upon the implied contract of indemnity, seeking to recover the damages and costs which he had been compelled to pay

and incur in the former action. The defendants paid into court a sum sufficient to cover the damages, but denied their liability to the costs.

The cause was tried before Hill, J., at the last Assizes at Liverpool, when it was contended on the part of the defendants, that, assuming that they were bound to indemnify the plaintiff against the damages for the breach of contract, they were not liable for the costs incurred by him in the wrongful defence of that action.

The learned judge left it to the jury to say whether the plaintiff in defending the action had pursued the course which a prudent and reasonable man would have done in his own case.

The jury returned a verdict for the plaintiff.

Overend, Q. C., in pursuance of leave reserved to him at the trial, moved to enter a nonsuit. He submitted that the plaintiff had no right to bring upon the defendants a greater charge than the damages for the breach of contract. [ERLE, C. J.—The defendants by their conduct in repudiating their liability for the breach of contract, compelled the plaintiff to adopt the course he *did. The case seems to have been left to the jury precisely in the terms of the notes to Lampleigh *v.* Brathwait (Hob. 105), in 1 Smith's Leading Cases, 4th edit., p. 126, where it is said: "No person has a right to inflame his own account against another, by incurring additional expense in the unrighteous resistance to an action he cannot defend: per Lord Denman, Short *v.* Kalloway, 10 Ad. & E. 28 (E. C. L. R. vol. 37). See Walker *v.* Hatton, 10 M. & W. 249,† and Tindall *v.* Bell, 11 M. & W. 228.† But if he make a reasonable and prudent compromise, he will be justified in doing so: Smith *v.* Compton, 3 B. & Ad. 407 (E. C. L. R. vol. 23). And, where the plaintiff's claim is of an unliquidated nature, and needs investigation, it seems that he may, unless expressly forbidden, incur the expense of investigating it, or at least that very slight evidence is enough to raise an inference that the person ultimately liable has assented to his doing so: Blyth *v.* Smith, 5 M. & G. 405 (E. C. L. R. vol. 44), 6 Scott N. R. 360. It seems to be for the jury in each case to say whether, in defending and incurring the costs sought to be recovered, the plaintiff pursued the course which a prudent and reasonable man unindemnified would do in his own case, and, if the jury find that he did, the costs may be recovered: Tindall *v.* Bell, 11 M. & W. 228."† CROWDER, J.—It seems a strong thing for the defendants, who repudiate their liability on the contract, to say that the plaintiff ought at once to have paid the money.] They might at least have let judgment go by default, and had the damages assessed.(*a*) The verdict shows that the defence was wrongful. [BYLES, J.—It is to be remembered that the action was an action of tort, where the damages would be assessed according to the rule laid down in Hadley *v.* *Baxendale, 9 M. & W. 341.† ERLE, C. J.—The jury have found that the plaintiff, in defending the action, acted as a prudent and reasonable man would do in his own case.] Here, the defendants did not assent to the defence of the action.

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ERLE, C. J.—I am of opinion that there ought to be no rule in this case. It appears that the plaintiff entered into a contract on behalf of the defendants for the purchase of certain goods, and that the defendants were the persons who caused that contract to be broken; that, the

(*a*) The master stated that this would not very materially have diminished the costs.

plaintiff having become liable for that breach of contract, the vendors brought an action against him; and that, the now defendants repudiating all liability on their part, the plaintiff defended the action, and was compelled to pay the damages and costs. It seems to me that the point left by the learned judge and found by the jury is decisive as to the plaintiff's right to recover the costs of that defence. The action was for unliquidated damages. If the defendant in that action had abstained from offering any defence, and had paid all that the plaintiff demanded, he could not have recovered it as against his principals if the jury had found that a prudent man would not have adopted that course. The defendants throughout denied their liability for the breach of contract which they themselves were instrumental in causing. The direction of the learned judge, which was precisely in accordance with the rule laid down in the notes to the case of Lampleigh *v.* Brathwait, in 1 Smith's Leading Cases, 4th edit. p. 126, was in my opinion perfectly correct, and the finding of the jury was quite right.

The rest of the court concurring, Rule refused.

*506] *MEMORANDA.

In Michaelmas Term, Peter Burke, Esq., of the Inner Temple, was called to the degree of the Coif. He gave rings with the motto "Veritas et judicium."

In Michaelmas Vacation, Sir Richard Budden Crowder, Knight, one of the Judges of the Court of Common Pleas, died.

Sir Henry Singer Keating, Knight, Her Majesty's Solicitor-General, was appointed a Judge of the Court of Common Pleas, in the room of Sir Richard Budden Crowder; having first been called to the degree of the Coif, on which occasion he gave rings with the motto "Fortitudine et constantia."

William Atherton, Esq., of the Inner Temple, one of Her Majesty's Counsel, was appointed Solicitor-General, in the room of Sir Henry Singer Keating. He shortly afterwards received the honour of Knighthood.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

XXIII. VICTORIA. 1860.

The Judges who usually sat in Banc in this Term, were:

ERLE, C. J. — WILLES, J.

WILLIAMS, J. — KEATING, J.

HOWKINS *v.* BENNET. *Jan.* 18.

In the memorial of an annuity under the 53 G. 3, c. 141, it is not necessary particularly to describe the instrument of grant: it is enough to state it to be a "grant of annuity." The consideration for an annuity was stated in the memorial to be 4000*l.* Of this sum 400*l.* was (pursuant to a previous understanding) immediately handed by one of the grantors to the solicitor for the grantee for procuration-money and expenses:—Held, that this, though it might have been ground for a motion to set aside the securities under the 6th section of the 53 G. 3, c. 141, afforded no defence by way of plea to an action upon the covenant.

There were *two* attesting witnesses to the deed; but, in the memorial, the names of *four* persons appeared as witnesses,—the clerk in copying the attestation having by mistake inserted the names of *two of the grantors*:—Held, that this was so evidently a blunder that no one could be misled by it, and that therefore it did not affect the validity of the memorial.

The annual payments (exceeding 5 per cent. on the sum advanced) were secured upon land, and the principal sum by a policy on the life of one of the grantors, with a covenant for payment of the annual premium:—Held, that the transaction was not usurious,—the principal being still placed in some degree of jeopardy.

THIS was an action to recover 507*l.* 8*s.* 3*d.*, the half-yearly payment of an annuity covenanted to be paid by the defendant to the plaintiff and his wife, by an indenture dated the 8th of December, 1852, and the *sum of 4000*l.*, the consideration-money for the same annuity. [*508

The defendant pleaded,—first, non est factum,—secondly, that no memorial was enrolled,—thirdly, to the claim for money payable, never indebted,—fourthly, to the whole declaration, payment,—fifthly, usury. The plaintiff joined issue on those pleas, and also replied to the last plea, that the matters and things in the fifth plea mentioned happened after the passing of the 13 & 14 Vict. c. 56; and the defendant rejoined that the alleged contract was a contract for the loan and forbearance of money upon the security of land; upon which rejoinder the plaintiff took issue and demurred; and the defendant joined in demurrer.

The particulars of the plaintiff's demand delivered with the declaration were as follows:—

"Under the indebitatus counts, the plaintiff seeks to recover the sum of 4000*l.* lent, paid, advanced, and received, to, by, or on behalf of the defendant on the 8th of December, 1852, together with interest on the same after the rate of 10 per cent. per annum from the 8th day of June, 1853."

The cause came on for trial before Coleridge, J., at the Summer Assizes at Ipswich, 1856, when it was ordered that a verdict should be entered for the plaintiff for 5000*l.* and 40*s.* costs, subject to a special case to be stated for the opinion of this court; and that the defendant should within fourteen days furnish a list of his objections: and that, in the event of the parties disagreeing, the case should be stated by a barrister, who for that purpose should be at liberty to examine witnesses touching the matters in dispute between the said parties.

The parties having disagreed, the arbitrator stated for the opinion of the court the following case:—

*509] In the month of August, 1852, Lewis Ambrose *Williams, a mining engineer residing at Bridgend, in Glamorganshire, applied to Messrs. Cates & Son, solicitors, to whom he had previously been slightly known, to obtain for himself and his brother William Williams, a mining engineer residing at Swansea, a sum of 3500*l.* on the security of a lease of mineral property in Glamorganshire, afterwards called by the parties the Pandy estate or colliery, which had been granted to them by the defendant, who was at that time personally unknown to Messrs. Cates & Son; and on the 22d of September, 1852, Messrs. Cates & Son wrote and sent to Mr. D. Keane, the plaintiff's attorney, the following letter:—

"22d September, 1852.

"Dear Sir,—Two clients of ours, mineral surveyors and civil engineers of standing and respectability, have lately taken a lease for 75 years from June, 1852, of some mineral property in Glamorganshire, consisting of about 120 acres, and are anxious to raise a sum of 3500*l.* by way of annuity at 7½ per cent. on the security of the lease, &c., for the purpose of working it. To assist in this object, their landlord, a man of fortune, who at present holds the property under his father (who is in his ninety-second year, and whose only son he is), for a term of ninety-nine years, which term will of course merge in the fee-simple on his father's death, has agreed to become surety for the payment of the annuity; thus, in addition to his personal security, which is ample, postponing the dead rents and royalties to the payment of the annuity, and charging his interest as well in the minerals as in the surface. The annuity will thus be the first charge on the property, with the exception

of a rent of 100*l.* per annum reserved to the superior landlord (the father), but which will of course cease on the son coming into possession. The present position and respectability of the principals and the *surety will bear the strictest inquiry; and the latter on his father's death will succeed to very large landed property in Glamorganshire, besides personal estate to a very large amount. If you have any client on whose behalf you can entertain the advance, we shall be happy to furnish you with further particulars; and, as the matter presses very much, we will do ourselves the pleasure of calling on you to-morrow morning. We may add that so fully satisfied are we with the security, that we should not hesitate for a moment, had we the means at the present time, in advancing the amount ourselves, or in recommending a client to do so. [*510

"CATES & SON."

"DANIEL KEANE, Esq."

Mr. Keane on the same day wrote in reply,—"I like the security you have forwarded, and will lay same immediately before my client, who I have very little doubt will entertain it."

In consequence of this letter, Mr. F. N. Cates, one of the firm of Cates & Son, on the 24th of September, called on Mr. Keane, when Mr. Keane said he thought he could effect the loan at 10*l.* per cent., and required in that case to be paid 10*l.* per cent. commission, to include all his charges, which Mr. F. N. Cates promised to submit to his clients; and having told Lewis Ambrose Williams thereof, and received instructions from him, Cates & Son on the same day wrote to Mr. Keane as follows:—"We have our client's authority to pay you the commission you require on negotiating the proposed loan, provided you can procure it at 8 per cent.; and, in order to meet the heavy deductions from the money they will have to receive, they will require 4000*l.*, instead of 3500*l.*" On the 4th of October Mr. Keane wrote to Cates & Son, as follows:—"I have advised with my clients on the subject of the loan of the 3500*l.*; and I am instructed to say that they will *entertain it. I should be glad to see you at your earliest convenience on the subject." [*511

Messrs. Cates & Son accordingly sent to Mr. Keane an abstract of a lease dated the 24th of June, 1852, granted to Messrs. Williams by the defendant, of the mineral property mentioned in Messrs. Cates & Son's letter of the 22d of September, 1852, the defendant being the person therein mentioned as their landlord; and, on the following day, the 5th of October, Mr. F. N. Cates called on Mr. Keane, who said he was instructed to complete the loan if his inquiries as to the personal character and position of the parties were satisfactorily answered, and, as he wished to peruse the abstract and consider the security to be taken, he appointed Mr. F. N. Cates to call again on the following day, which the latter accordingly did, when Mr. Keane said he proposed to take merely a deposit of the lease, and to secure the loan (which he agreed to make 4000*l.*) by a warrant of attorney accompanied by a deed of covenant, lending the money for a period to be agreed on. To this Mr. Cates said he had no authority to assent, and that he thought Mr. Bennet, the defendant, would object to it, as making himself liable to be called upon to repay the principal money. Mr. Keane also at this interview proposed to insure defendant's life against his (defendant's)

father's life. The mode of securing the advance was not agreed on: but Mr. Keane proposed to make a journey to Bridgend, in Glamorganshire, where one of the Messrs. Williams resided, and in the neighbourhood of which the defendant's father's family residence and property and the premises comprised in the lease to Messrs. Williams were situate, to make inquiries respecting Messrs. Williams and the defendant, and wished to meet the defendant there; and Mr. Keane intimated, that, if his inquiries were satisfactorily answered, he was authorized to complete the loan at 8*l.* per cent. interest.

*512] *On the 7th of October, Messrs. Cates & Son wrote to Mr. Keane, as follows:—"£4000 loan. We are awaiting a communication from you on this subject before writing to our clients and Mr. Bennet, which we are anxious to do to-day." To this letter Mr. Keane, on the same day, replied as follows:—"£4000 loan. I shall carry out this loan as soon as on a personal inquiry at Bridgend I find everything as stated by you turns out to be the fact, of which I have no doubt. I need hardly say that such inquiry shall be conducted with a due regard to the feelings and position of Mr. Bennet, so as not to be brought to the knowledge or attention of parties whom he would not be desirous of informing of the matter. I propose leaving town on Monday for the purpose, and should require a letter of introduction to Mr. Bennet's solicitor at Bridgend."

On the 9th of October, Messrs. Cates & Son wrote to Mr. Keane a letter enclosing a copy of one from the defendant to Mr. William Lewis, of Bridgend, the country solicitor of the defendant's father and family, written with a view to introducing Mr. Keane to Mr. Lewis. Such letter and copy letter were severally as follows:—

"23, Fenchurch Street, 9th October, 1852.

"£4000 Loan.

"Dear Sir,—We do not think we are quite justified in furnishing you with a copy of Mr. Bennet's letter to Mr. Lewis, without the sanction of the former; but, nevertheless, as you desire it, and we cannot anticipate any objection on his part to our doing so, we enclose you a copy of it. "CATES & SON."

"DANIEL KEANE, Esq."

"London, October 7th, 1852.

"My dear Sir,—Having let the Pandy colliery to Messrs. Williams,
*513] and being very anxious that they *should have the means of fully developing its resources, which I believe are good, I have been induced to become a surety for the regular payment of interest, and that the principal of a sum to be borrowed (4000*l.*) shall not be applied otherwise than to be laid out entirely on the property; for which end it will be placed in the Bridgend Bank in my name jointly with theirs. My position and probable future prospects must be explained, and that I am not likely to be quite a man of straw. I have no reference which I could offer which would be likely to carry so much weight as this to yourself: and I feel that confidence in you will be unbroken. Will you oblige me by stating to Mr. Keane, who will call on you at Bridgend, your opinion on the subject. "J. W. BENNET."

"WM. LEWIS, Esq., Bridgend."

On the 14th of October, Mr. F. N. Cates called on Mr. Keane to

inquire about the result of his journey, and found that he had not then been to Bridgend; but he informed Mr. Cates that he had made inquiries respecting the Messrs. Williams, which had been satisfactorily answered.

Mr. Keane on the same day went to Bridgend, and saw Mr. Lewis, who told him, in answer to his inquiries, that Mr. Bennet, the father, was a very wealthy man; that he was very old; and that the defendant was his only son; and there were several daughters. Mr. Keane inquired about some property at Swansea belonging to the defendant, and was told by Mr. Lewis that he did not know anything about it. Mr. Keane, on the same day, saw the defendant at Bridgend, when the defendant informed Mr. Keane that he was in possession of some property at Swansea, the title-deeds of which were in the hands of his father; and the defendant was understood by Mr. Keane to *consent that this property should be included in the security for the proposed advance. [*514

On the 16th of October, Mr. F. N. Cates had an interview with Mr. Keane in London, at which Mr. Keane said, that, although disappointed with the result of his inquiries as regarded the defendant, he was satisfied to complete the loan of 4000*l.*, and to advance a further sum if necessary, the defendant's life being insured at Messrs. Williams's expense against his (the defendant's) father's, and the defendant giving a security upon his property at Swansea, to which he said the defendant and Lewis Ambrose Williams had agreed; and he thought his client would advance the amount at 8 per cent.

On the 21st of October, Mr. F. N. Cates called on Mr. Keane, and read to him a letter which he had received from Lewis Ambrose Williams, to the effect that the defendant denied having consented to put the Swansea property into security, and objected to do so; when Mr. Keane said that Mr. Bennet had most distinctly consented, in Mr. Lewis Ambrose Williams's *absence*, to give a security upon the Swansea property; and that he had explained to Mr. Bennet that he considered him the real principal in the transaction; and he proposed to write a letter, to be communicated to the Messrs. Williams: and, on the 21st and 23d of October, Mr. Keane wrote to Messrs. Cates & Son, as follows:—

"21st October, 1852.

"Re Williams and Bennet.

"Dear Sirs,—In reply to your communication on the subject of Mr. Bennet not intending to put the Swansea property into this security, I beg leave to observe that Mr. Bennet expressly consented to charge the Swansea property with the due payment of the proposed loan. I understand Mr. Bennet, sen., has *given his son the possession and ownership of the Swansea estate, but whether by deed or otherwise I do not know. I do not think Mr. Bennet will retreat from that: and all I want to know is, a sufficient description of the parcels, to insert them in the deed, so as to give the lenders a general charge over the particular property. [*515

"D. KEANE."

"Messrs. CATES & SON."

"22d October, 1852.

"£4000 Loan.

"Dear Sirs,—I have this morning received definite instructions to proceed with the loan to Mr. Bennet and others. In reply to your

favour, I beg to say that I regret much that I cannot oblige you in the matter of the policy of insurance, as my client has an office that he takes an interest in himself. I have to request that you will send me the parcels of the Swansea property as soon as possible, and also give me a general notion of how Mr. Bennet gets that estate. I shall send you a proposal for a policy on Monday on Mr. Bennet's life.

"Messrs. CATES & SON." "DANIEL KEANE."

Messrs. Cates & Son accordingly, on the 27th of October, sent Mr. Keane a copy of the half-yearly rent-roll of the Swansea property, accompanied by the following letter:—

"27th October, 1852.

"Williams's Loan.

"Dear Sir,—We send you herewith a copy of the half-yearly rent-roll of Mr. Bennet's property in Swansea and its neighbourhood, showing a rental for the half-year of 203*l.* 17*s.* 5*d.*; and, as the lessees of a portion of the property are now working the minerals thereunder,
*516] there will shortly be a considerable increase *of income arising from the royalties. As regards Mr. Bennet's title, we can give no further information than that he was put in possession of the property some years since by his father, who was owner in fee; and he has since then been in receipt of the rents, and in the habit of granting leases of the property for building and other purposes. Mr. Bennet, in consenting to give a greater security upon this property than his personal covenant would afford, only does so upon the distinct understanding that the grantee's remedies against him and it are only exercised in case the colliery fail in realizing sufficient to keep down the annuity.

"DANIEL KEANE, Esq." "CATES & SON."

Messrs. Williams were anxious to commence opening the colliery, and, for this purpose, were desirous of obtaining a sum of 1000*l.* in advance on account of the 4000*l.* Mr. Keane agreed to make the advance on a contract being signed; and on the 2d of November he prepared and delivered to Messrs. Cates & Son a memorandum without date, a copy of which was contained in an appendix to the case.(*a*)
*517] This contract *was prepared while Mr. F. N. Cates waited in Mr. Keane's office; and Mr. Cates objected to the form of it, in the defendant being made the principal in the transaction, and pointed out to Mr. Keane that the transaction as expressed in the contract could

(*a*) Memorandum between Daniel Keane of the one part, and John Wick Bennet of the other part. Mr. Keane agrees to lend or procure to be lent to the said John Wick Bennet 4000*l.*, within one month from this day, on the security and terms following, that is to say, Mr. Bennet is to pay interest after the rate of 8*l.* per cent. per annum to the lender of such 4000*l.*, and to pay Mr. Keane 400*l.* procuration-money on the day of execution of same, which is to include all expenses of drawing and engrossing and completing on the part of the lender of the proposed security; Mr. Bennet to pay all his own expenses. The two Messrs. Williams, the engineers, to concur and join as sureties. The security to include a charge on the property of Mr. Bennet at Swansea, of which the rental has been produced and sent to Mr. Keane, amounting half-yearly to 203*l.* 17*s.*, with power of distress and entry in case of default of payment of interest. It is agreed that an effectual insurance is to be made on Mr. J. W. Bennet's life against his father's, for the amount of 4500*l.* Loan to be only during the life of his father, when lenders to call it in by giving one month's notice, if they please. A warrant of attorney to be given collateral with the mortgage deed. A separate warrant of attorney from the two Williamses. Judgment to be entered up and registered against both. The security to embrace not only the Swansea property, but all other property, whether present or reversionary, expectant on the decease of the father.

not be legally carried out, inasmuch as the principal money and 8*l.* per cent. were purported to be secured. Mr. Keane accordingly requested Messrs. Cates & Son to prepare a form of contract, and submit it to him for his approval, which they did on the same day. The contract so prepared by Messrs. Cates & Son was also appended to the case.(*a*)

(*a*) Memorandum of agreement made the —— day of ———, 1852, between Daniel Keane, attorney for and on behalf of ————, of the one part, and William Williams and Lewis Ambrose Williams, civil engineers and mineral surveyors, and John Wick Bennet, Esq., of the other part.

The said Daniel Keane doth hereby agree, on behalf of the said ————, to lend and advance unto the said William Williams and Lewis Ambrose Williams, within one calendar month from the date hereof, the sum of 4000*l.*, upon the security and the terms and conditions following, that is to say:—

The said William Williams and Lewis Ambrose Williams, in consideration of such advance, are to grant an annuity of 320*l.* per annum, and the said John Wick Bennet is to join in granting the said annuity, as surety for the said William Williams and Lewis Ambrose Williams.

The said annuity to be charged upon and payable out of certain lands and minerals in and under the parish of Newcastle, in the county of Glamorgan, and other the premises comprised in and held under a lease granted by the said John Wick Bennet to the said William Williams and Lewis Ambrose Williams, bearing date the 24th of June, 1852, an abstract whereof has been already furnished by them to the said Daniel Keane.

The said annuity to be also issuing and payable out of and charged upon certain messuages, tenements, lands, and premises situate in and near Swansea, in the said county of Glamorgan, and in the county of Carmarthen, belonging to or possessed by the said John Wick Bennet, and producing an annual value of 407*l.* 14*s.*, or thereabouts; the particulars of which last-mentioned property are comprised in the half-yearly rental or income thereof already furnished by the said William Williams, Lewis Ambrose Williams, and John Wick Bennet to the said Daniel Keane.

The said Daniel Keane shall not be entitled to call for the title of the said John Wick Bennet to any or either of the said lands and premises hereinbefore mentioned; nor the production or delivery to him of any deeds, documents, or other evidence relating thereto; and the powers, rights, or remedies of the grantee of the said annuity against the person or property of the said John Wick Bennet shall only be exercised in case of the insufficiency of the said premises comprised in the said indenture of lease of the 24th of June, 1852, to keep down the said annuity.

That, in addition to such securities, the said John Wick Bennet is to affect an insurance in such insurance office as shall be approved of by the said Daniel Keane upon the life of him the said John Wick Bennet against that of his father John Bennet, in the sum of 4500*l.*

That the said William Williams and Lewis Ambrose Williams shall give and execute unto the grantee their warrant of attorney for collaterally securing the due payment of the said annuity, upon which judgment shall be forthwith entered up and registered.

That a like warrant of attorney shall be given and executed by the said John Wick Bennet, upon which judgment shall be forthwith entered up and registered.

That the sum of 4000*l.* shall be paid by the said grantors to the said Daniel Keane upon the completion of the securities and payment of the consideration-money, as and for his costs and charges and remuneration in negotiating the said loan and preparing and engrossing the securities and all incidental expenses, except the costs of the said grantors, which shall be borne by themselves respectively.

That copies of the several securities shall be furnished to the grantors or their solicitors by and at the expense of the grantees; and, in case of difference arising between the parties touching any of the covenants, clauses, or powers inserted therein, or the consideration thereof, or of this contract, the same shall be submitted to a barrister, the costs of such reference to be in his discretion, and his decision to be binding on all the said parties.

That, pending the preparation of the said securities, and until the same shall be completed, the said Daniel Keane shall pay unto the said grantors on account and in part of said consideration-money of 4000*l.*, the sum of 1000*l.*, for which sum the said William Williams and Lewis Ambrose Williams shall draw upon the said John Wick Bennet, and he shall accept a bill of exchange payable one month after date, but which shall not be negotiated or parted with by the said Daniel Keane, but shall remain in his hands until the completion of the said loan when the same shall be delivered up to the other parties hereto to be cancelled.

*518] *On the 3d of November, Mr. F. N. Cates saw Mr. Keane on the subject of this latter contract. Mr. Keane objected to it, on the ground that under it the loan being made by way of annuity the *519] principal *would not be recoverable. Mr. Keane required that the loan should be made so as to secure 8*l.* per cent. interest and the principal money, which he considered could be done; and, Mr. Cates being of a different opinion, Mr. Keane requested Mr. Cates to accompany him to his (Mr. Keane's) conveyancer, to consult him on the subject. Mr. Cates did so, and his view was supported by the gentleman appealed to, with whom Mr. Cates left Mr. Keane to advise with him on the security to be taken.

*520] *On this conference being ended, Mr. Keane stated to Mr. Cates (who was waiting its result) that he agreed to the terms contained in the contract, but that, as he had led his clients (the plaintiff and his wife) to believe that he could secure the repayment of the principal money, he could not sign it without their previous authority, which he should receive on the following Friday.

On this day (the 5th of November) Mr. F. N. Cates called on Mr. Keane, who said he had been considering the security to be taken, and must have a policy on the whole life of Mr. Bennet (the defendant), and subsequently wrote the following letter embodying the requisition,—"I have heard from my client: and, as it is impossible to show with anything like certainty that Mr. Bennet has anything more than a life estate, if even he has that, he thinks he cannot do without a full policy on Mr. Bennet's life. If this is assented to, I am prepared this day to advance 1000*l.* on the contract being signed, and to make the loan 5000*l.*"

This was objected to by Messrs. Cates & Son on behalf of their clients, who however proposed to pay half the premium: and, on the 7th of November, Mr. Keane wrote to Messrs. Cates & Son, as follows:—"I have advised at considerable length with my clients, and they have determined on reducing the rate of interest to 7*l.* per cent., but on the understanding that you pay the full insurance on 4350*l.* On this understanding, I am instructed to complete."

On the 9th of November, before receiving this letter, Mr. F. N. Cates called on Mr. Keane, who referred to the letter he had written, the terms of which Mr. Cates declined: and, after some discussion, in the course of which Mr. Cates proposed a policy on the life of Mr. Lewis Ambrose Williams for the whole amount, which was objected to by Mr. *521] Keane because it would defer *for too long the repayment of the principal money, Mr. Keane proposed to reduce the amount of the proposed policy on the defendant's life to 4070*l.*; and he wrote the following letter to that effect:—

"9th November, 1852.

"Dear Sirs,—In further explanation of my letter of yesterday, I beg to say that I shall be content with a policy on Mr. Bennet's life for 4070*l.* The title I will be satisfied with as to the land, &c., in Wales, is, Mr. Bennet's covenant that he is entitled to the fee on his father's death, and will warrant same. I have no objection to advance 1000*l.* this day on a bill and a warrant of attorney at a month, in anticipation of loan. This will be my own transaction; but I will not part with the bill at all. "DANIEL KEANE."

"Messrs. CATES & SON."

Messrs. Williams objected to take the 1000*l.* except on the contract being signed; and this was communicated by Messrs. Cates & Son to Mr. Keane by the following letter, of the same date:—

"9th November, 1852.

"Dear Sir,—Our clients will not take the 1000*l.*, except on a positive contract on the part and in the name of your clients to advance the remaining 3000*l.* on the terms agreed on. Mr. Bennet will, as you require, covenant that he is seised in fee in the Swansea property; but we beg again to remind you of the terms on which Mr. Bennet includes that property in the security contained in our letter to you (accompanying copy rent-roll) of the 27th ult., and which we understood you to-day to agree to. Mr. Bennet proposes to insure in the Argus, an office approved by you, where the rates are lower than in the English and Scottish: and he will assign the policy to your clients, *to be reassigned to him on the redemption of the annuity. We shall [*522 be glad to be favoured with an answer to this letter, or at least an acknowledgment by the bearer. We trust, after the long delay, you will lose not a moment in forwarding the securities.

"Cates & Son."

"Daniel Keane, Esq."

Mr. Keane having declined to have the contract signed as referred to in the above letter, the 1000*l.* was not advanced.

A proposal for an insurance on the life of the defendant with the English and Scottish Law Life Assurance Society for the sum of 4070*l.* was accordingly submitted to that society by Mr. Keane on behalf of the plaintiff, and was accepted at the annual premium of 227*l.* 8*s.* 3*d.* On the 16th of November, Mr. Keane wrote to Messrs. Cates & Son, in reply to their inquiry as to the progress Mr. Keane was making with the draft annuity deed, as follows:—"The draft is now in hand. I hope will be finished to-night. The first year's policy will be advanced by me, but I presume will be paid by Mr. Bennet."

The draft of the deed for securing the proposed sum of 4000*l.* was prepared by Mr. Keane on behalf of the plaintiff and his wife, and laid by him before Messrs. Cates & Son. [The form in which it stood when sent by Mr. Keane to them, and the subsequent alterations therein, were shown in a copy draft deed marked and signed by the arbitrator, which was a fair copy of the original draft made for convenience of reference, and which original and copy were to be deposited with one of the masters, for the purposes of the argument of the special case. In such copy, the text of the original draft was shown in black ink, and the subsequent alterations in red ink; and the same as it then stood was admitted to be a true copy of the engrossment *of the deed; [*523 and either party was to be at liberty to refer to it on the argument of the case as such true copy.]

Accompanying the draft of the indenture were draft warrants of attorney to confess judgments at the suit of the plaintiff and Marian his wife against the defendant and the Messrs. Williams respectively, in the sum of 8000*l.*, and costs of suit, with a defeasance to each of such warrants of attorney limiting the effect thereof. Such drafts were altered by Messrs. Cates & Son on behalf of the defendant and Messrs. Williams, in accordance with their alterations in the draft of the said

indenture. [The form in which such respective draft warrants of attorney and defeasance stood when sent by Mr. Keane to Messrs. Cates & Son, and the subsequent alterations therein, were shown in the copies thereof marked and signed by the arbitrator, which were respectively fair copies of such original drafts thereof made for convenience of reference, and which originals and copies were to be deposited with one of the masters, for the purposes of the argument of the case. In such respective copies the original text was shown in black ink, and the subsequent alterations in red ink; and the same as they then stood were admitted to be true copies of the engrossment of the said warrants of attorney and defeasances respectively, and either party was to be at liberty to refer to them on the argument of the case as such true copies.]

The annuity deed and warrants of attorney were respectively engrossed by Mr. Keane in the form in which they had been ultimately settled.

On the 1st of December, whilst the drafts of the deed and warrants of attorney were in the course of being settled, Mr. F. N. Cates saw Mr. Keane; and, not having received the original lease to the defendant from his father, he promised Mr. Keane that he would *use every
*524] effort to obtain it, and proposed, that, in the absence of it, Mr. Keane should take a declaration by the defendant, made under the statute 5 & 6 W. 4, c. 62, that the lease was in existence and was unencumbered, which Mr. Keane agreed to. On the 2d of December Mr. F. N. Cates accordingly prepared a draft of such a declaration, and left the same, together with a copy of the lease, with Mr. Keane, who approved of the draft. Mr. F. N. Cates had, however, in the meantime, written to the defendant at Bridgend, stating that a declaration had been proposed to be made; and, on the 3d of December, he received by post from the defendant a letter together with a declaration which had been prepared by Mr. Lewis and made by the defendant at Bridgend on the previous day. This declaration, together with the letter which accompanied it, Mr. F. N. Cates showed on the same day to Mr. Keane, who perused and approved of the declaration, and returned it to Mr. F. N. Cates, by whom it was kept until the 8th of December, when it was handed over to Mr. Keane, as after mentioned. [A copy of this declaration was contained in the appendix to the case.] On the same day, in consequence of remarks having been made by Mr. Keane's counsel on the meagreness of the description in the draft of the property at Swansea, Mr. F. N. Cates offered to furnish a declaration by William Williams, who had acted as defendant's land agent, verifying the schedule annexed to the deed, and stating the defendant's acts of ownership, and that he, William Williams, had no notice of any encumbrances, and received the rents for the defendant. This was agreed to by Mr. Keane; but, on Mr. Cates applying to William Williams to make the proposed declaration, he declined to do so, stating that he had for the last three years ceased to collect the rents, but that his son could make it, *with some alterations. Accordingly, on the 7th
*525] of December, a declaration under the statute 5 & 6 W. 4, c. 62, was made by William John Williams, the son, a copy of which was contained in the appendix to the case.

On the 6th of December, the engrossments of the annuity-deed, and

of the warrant of attorney from the defendant, were executed by him at Bridgend in the presence of Mr. F. N. Cates, who attested the execution; and, on the same day, Mr. Keane wrote to Messrs. Cates & Son, as follows:—"I have been searching for judgments, but found none against your client Mr Bennet: but I have found two annuities enrolled, of 100*l.* and 105*l.*, which must be explained before completion. They were granted to a Mr. Davies. Pray let me know if they are still subsisting." The annuities referred to were not then subsisting.

In the afternoon of the 8th of December, the parties met by appointment for the purpose of completing the transaction. There were present Mr. Lewis Ambrose Williams, Mr. William Williams, Mr. Keane, Mr. Callcott, clerk to Mr. Keane, Mr. G. Cates, and Mr. F. N. Cates. Mr. F. N. Cates had previously, by arrangement with Mr. Keane, prepared an undertaking on Mr. Keane's part to procure the plaintiff's receipt for the 227*l.* 8*s.* 3*d.*, the amount of the premium on the policy of insurance, as a payment on account of the first half-year's annuity; and Mr. Keane signed the undertaking and handed it across the table to William Williams, together with two stamped receipts signed by him for 400*l.* and 227*l.* 8*s.* 3*d.* respectively. The undertaking and receipts were as follows:—"Gentlemen,—I should feel obliged by your advancing 227*l.* 8*s.* 3*d.*, the first year's premium on the policy of insurance effected by my clients Mr. and Mrs. Howkins on the life of Mr. Bennet with the English and Scottish Insurance Company, for which sum I *hereby undertake immediately to procure and deliver the [*526 stamped receipt of Mr. and Mrs. Howkins as a payment in advance on account of the first half-year's annuity to become due on the 8th June next." (Signed) "W. & L. A. WILLIAMS." "Received, the 8th December, 1852, of Messrs. Williams, the sum of 227*l.* 8*s.* 3*d.*, to pay premium on policy on Mr. J. W. Bennet's life. DANIEL KEANE." "Received, the 8th December, 1852, of Messrs. Williams, 400*l.*, my costs, charges, and expenses, as agreed. DANIEL KEANE." Mr. Keane at the same time produced 4000*l.* in bank notes and gold, and passed the same across the table to William Williams, who counted it, Mr. Keane's clerk and Mr. F. N. Cates at the same time taking down the numbers, dates, and amounts of the notes. Some discussion then ensued on the subject of the 227*l.* 8*s.* 3*d.*; Messrs. Williams claiming a rebate of interest in respect of that sum; and ultimately it was agreed that a rebate of 13*l.* should be made. The annuity-deed and the warrant of attorney from the Messrs. Williams were then executed by them, and the receipt for the consideration-money signed; and William Williams then immediately returned to Mr. Keane out of the money which had been passed across the table to him notes and gold to the amount of 614*l.* The execution of the said deed by the said William Williams and Lewis Ambrose Williams, respectively, was attested by the said F. N. Cates, who signed such attestation, "Fras. N. Cates," and by the said Mr. Callcott, who signed such attestation "F. H. Callcott;" and there were no other witnesses to the execution who signed the attestation.

At the close of the transaction, Mr. F. N. Cates handed to Mr. Keane the declarations before mentioned made by the defendant and William John Williams.

*527] Mr. Keane took possession of the annuity-deed and *the warrants of attorney and declarations: but the lease from the defendant to Messrs. Williams was not handed over to him. The lease was brought to the place of meeting by Mr. G. Cates in a leather travelling bag. No inquiry was made for it by Mr. Keane, and it was not offered to him or taken out of the bag, but was carried away again by Mr. G. Cates, who was aware it was in the bag. On the next morning, the lease was taken by Mr. G. Cates to the office of Messrs. Cates & Son, and William Williams and F. N. Cates became aware that it had not been handed over to Mr. Keane; but no communication was made to Mr. Keane that the lease was still in Messrs. Cates's possession, nor were any steps taken by any of the parties to put Mr. Keane in possession of it; and the lease was, notwithstanding several applications for it on the part of Mr. Keane, retained by Messrs. Cates & Son until the 5th of August, 1854, when they handed it over to Mr. Keane, on his giving the following letter and memorandum:—

"Memorandum. Messrs. Cates & Son have this day, 5th August, 1854, handed me the original lease, dated 24th June, 1852, from J. W. Bennet, Esq., to Messrs. W. and L. A. Williams, of lands and minerals at Pandy, &c., being the lease of that date comprised in the grant of annuity to Mr. and Mrs. Howkins, dated 8th December, 1852, and referred to in the next letter, upon the terms of Messrs. Cates & Son's letter to me of the 1st instant."

The letter referred to was as follows:—

"1st August, 1854.

"Sir,—We have written to Mr. W. Williams and Mr. Verity informing them of your application for the lease from Mr. Bennet to Messrs. Williams, and of our intention to give it up to you, which we shall do

*528] without they send us express notice to the contrary, in *which case it might be necessary for us to consider our position. We have also written to Mr. Bennet in reference to the other lease, and will give you what information we can about it, on hearing from him.

"Of course, the delivery to you of the leases or either of them must not be taken as a recognition or ratification in any way of the annuities, or as an admission that the leases are legally affected by them. It must be understood that they are only given up now instead of on the day of the date of the deed, and that your client's legal position is the same as if they had then been delivered to them.

"D. KEANE, Esq." "CATES & SON."

In the course of the evening of the 8th of December, and on the 9th, when the Messrs. Cates and William Williams were alone together, some observations were made by the Messrs. Cates as to the incautious way in which Mr. Keane had acted in the transaction, particularly with reference to the stipulating for the 400*l.*; and it was remarked by Mr. F. N. Cates that that circumstance had a tendency to jeopardize the transaction.

Some time previously to the 22d of September, 1852, and before the lease from the defendant to Messrs. Williams was made, the property comprised in the lease to the defendant from his father, and particularly described in the statutory declaration made by the defendant on the 2d of December, 1852, was mortgaged by the defendant to one Matthewson, to secure a sum of 1200*l.*, and continued so mortgaged until and

at the time the defendant made the said declaration, and thence until the present time; and the said lease was at the time the declaration was made, and has ever since continued to be, in the possession of the said Mr. Mattheson. The property at Swansea comprised in the schedule annexed to the annuity-deed, and in the schedule referred to in the declaration of *William John Williams before mentioned, [*529 was some time previous to the 22d of September, 1852, mortgaged by the defendant to one David Francis, to secure the sum of 5000*l.*, and has ever since continued so mortgaged; and the title-deeds of the said property were and have ever since continued to be in the possession of the said David Francis. The fact of such mortgage to David Francis was known to William Williams at the time of the application to Messrs. Cates & Son in September, 1852; and the said William Williams, in the course of his communications with the Messrs. Cates, stated to them that the defendant's father had put the defendant in possession of the property at Swansea, and that the title-deeds were in the possession of the father, who would not part with them, which statements were communicated by Messrs. Cates to Mr. Keane. The said William Williams, at the time he made such statements, knew them to be false.

Previously to the execution of the annuity deed, there was an understanding between the defendant and Lewis Ambrose Williams and William Williams that the defendant was to borrow of them a portion of the money obtained from the plaintiff; and, on the 15th of December, 1852, the Messrs. Williams paid to Francis, on account of the defendant, 319*l.* 12*s.* On the 10th of December they paid to the defendant 150*l.*, on the 26th 100*l.*, and on the 5th of March, 1853, 100*l.* Part of this money was repaid by the defendant, and no rent has been paid to the defendant by the Messrs. Williams.

Shortly after the 8th of December, 1852, Mr. Keane paid the first year's premium on the policy of insurance, which was thereupon delivered to him on behalf of the plaintiff by the English and Scottish Law Life Assurance Society.

Judgment was signed on the warrant of attorney *against the [*530 defendant at the suit of the plaintiff and his wife for 8000*l.* and 3*l.* 10*s.* costs on the 15th of January, 1853, and against William Williams and Lewis Ambrose Williams, at the like suit, and for the same amounts, on the 13th of February, 1853; and the warrants of attorney were filed of record in the Court of Queen's Bench.

A memorial of the annuity was enrolled in Chancery on the 4th of January, 1853. [See next page.] No other memorial was enrolled.

On the 4th of January, 1853, William Williams applied to Messrs. Cates & Son to raise 12,000*l.* on mortgage of the property at Swansea, for the purpose of paying off the annuity and certain judgments against the defendant, a list of which he handed to them; and they informed him that 8000*l.* was the largest sum they should probably be able to obtain, or for which there was a security.

On the 12th of April, 1853, Messrs. Cates & Son wrote and sent to Mr. Keane the following letter:—

"Fenchurch Street, 12th April, 1853.

"Dear Sir,—In order to a proper development of the mineral property they hold of Mr. Bennet at Pandy, Messrs. Williams will shortly

A Memorial to be enrolled in Her Majesty's High Court of Chancery pursuant to an Act of Parliament made and passed in the Fifty-third year of the reign of His late Majesty King George the Third, intituled "An Act to repeal an Act of the Seventh year of the reign of His present Majesty, intituled 'An Act for Registering the Grants of Life Annuities, and for the better protection of Infants against such Grants, and to substitute other provisions in lieu thereof.'"

Date of Instrument.	Nature of Instrument.	Names of Parties.	Names of Witnesses.	Name or names of person or persons by whom annuity or rent-charge to be beneficially received.	Person or persons for whose life or lives the annuity or rent-charge is granted.	Consideration, and how paid.	Amount of annuity or rent-charge.
8th December, 1852.	Grant of Annuity.	William Williams, Lewis Ambrose Williams, John Wick Bennet, Theophilus Howkins, and Marian his wife, and Daniel Keane.	Fra. M. Cates, J. H. Callcott, Wm. Williams, Lewis A. Williams,	Theophilus Howkins, and Marian, his wife.	John Wick Bennet.	Four thousand pounds, paid as follows, viz. £1000 R/H 31898, 14th July, 1852 1000 do. 32644, ditto 1000 do. 34195, ditto 500 P/O 93954, 29th May, 1852 100 D/O 75472, 10th May, 1852 100 do. 75473, ditto 100 do. 75474, ditto 100 do. 75475, ditto 10 R/W 31465, 6th October, 1852 10 do. 31466, ditto 10 do. 31467, ditto 10 do. 31468, ditto 50 O/A 66825, 9th March, 1852 and 10 in gold. £4000	

Enrolled at eleven o'clock in the forenoon of the fourth day of January, in the year of Our Lord 1853.

This agrees with the record,

W. Wright, Clerk of Enrolments in Chancery.

require an additional sum of 1500*l.*, and we should be glad to be informed whether your clients Mr. and Mrs. Howkins are disposed and prepared to advance that further sum upon the security they now hold, and upon the terms of the former loan, with the exception of any policy, which for the additional sum our clients would decline being at the expense of. It becomes a simple question, therefore, of advancing or not the further sum required at 7 per cent. interest. Messrs. Williams have succeeded in opening their colliery, and are now working coal (as we can testify from our own personal knowledge, Mr. P. Cates having visited the spot), to *advantage; and, whatever reason you might [*532 before have had for requiring a policy, there is now in this property an ample security independently of Mr. Bennet's estate at Swansea, which is of daily increasing value. Messrs. Williams have heavy payments to make shortly, for a steam-engine 600*l.*, and other necessary plant for the colliery, involving a great outlay, which will considerably intrench upon the balance remaining at their bankers'; and we must therefore beg the favour of an early reply, in order that, in the event of its being in the negative, we may at once make other arrangements. "CATES & SON."

"D. KEANE, Esq."

Mr. Keane, in answer to this letter, declined to make the proposed advance.

On the 23d of April, Mr. F. N. Cates, by the instructions of Mr. Bennet, applied to Mr. Keane to make an advance of money, which Mr. Keane declined to do.

The balance of the half-year's annuity which became due on the 8th of June, 1853, 26*l.* 5*s.* 10½*d.*, was paid by the Messrs. Williams after a fi. fa. had been issued against them on the judgment signed on the warrant of attorney.

In the month of July, 1853, William Williams being still desirous of obtaining an advance of money, Messrs. Cates & Son proposed themselves to make an advance; and, in order to do so, they, at an interview with him on the 16th of July, required to be appointed receivers and managers of the colliery for the purpose of keeping down the plaintiff's annuity, and seeing that the money was properly laid out; and they required to have the title-deeds, when he informed them that the estate of Swansea was already mortgaged for 7000*l.*, and that the mortgagee had the title-deeds.

On the same 15th of July, Mr. F. N. Cates, in consequence of William Williams stating to him that Mr. *Keane complained that [*533 the abstracts of the title to the Swansea estate had not been delivered to him, wrote a letter to Mr. Keane, which he gave to William Williams to deliver, and which letter was never delivered to Mr. Keane. In this letter no mention was made of the fact that the Swansea estate was mortgaged; but, on the 6th of August, 1853, Mr. F. N. Cates did inform Mr. Keane of the fact of there being a mortgage of the estate; and having on the 12th of August obtained the particulars from the defendant, he on the 13th told Mr. Keane he understood the mortgage amounted to 7000*l.*

The fact of the mortgage of the property comprised in the lease to the defendant from his father was not known to either of the Messrs. Cates until the first of October, 1855.

The half-year's annuity which became due on the 8th of December, 1853, was not paid; and, on the plaintiff issuing a writ of fi. fa. against the Messrs. Williams, and seizing under it the property at the colliery, an application was made by Messrs. Cates & Son, as attorneys for Messrs. Williams, to set aside the warrants of attorney and the judgment signed thereon and writ of fi. fa. and other proceedings; and, on the 17th of January, 1854, they were ordered by Erle, J., to be set aside, on the ground that the warrant of attorney was not mentioned in the memorial.

The writ of summons in this action was issued on the 25th of January, 1854; and on the 7th of February, 1854, the warrant of attorney executed by the defendant and the judgment signed thereon were, on the application of Messrs. Cates & Son, as attorneys for the defendant, set aside, by consent, by an order of Coleridge, J.

Since this action was commenced, the plaintiff has brought actions
*534] against William Williams and Lewis *Ambrose Williams to recover the arrears of the annuity and the sum of 4000*l.*, the consideration-money thereof. The pleadings in such actions respectively and the issues joined therein were precisely similar to those in the present action; and the Messrs. Williams submitted to a verdict against them in such actions respectively on the first count of the declaration therein respectively.

The defendant's father died in the month of November, 1855.

The following is the list of objections to the validity of the deed on which the defendant insisted under his second plea, delivered pursuant to the order of Nisi Prius in this cause. [Those printed in italics were abandoned in the course of the argument.]

"1. *The memorial does not describe the nature of the said deed. The only instrument described in the memorial is a grant of annuity; and the said deed is not a grant of annuity. The same is a covenant to pay an annuity or yearly sum for a term of sixty years, if the defendant so long live, and a demise and conveyance of certain tenements therein mentioned, and should have been so described.*

"2. *All the instruments by which the said annuity was secured are not mentioned in the memorial, that is to say, a policy of assurance by the English and Scottish Law Life Assurance Society for* 4070*l. on the life of the defendant; a warrant of attorney by William Williams and Lewis Ambrose Williams, authorizing judgment in the Court of Queen's Bench for* 8000*l. and costs of suit, at the suit of Theophilus Howkins and Marian his wife; a warrant of attorney by the defendant authorizing judgment in the said court for* 8000*l. and costs of suit, at the suit of the said Theophilus Howkins and his said wife,—the same being*
*535] *instruments by which the said annuity was secured,—*are not mentioned or in any way described in the said memorial.*

"3. *The names of the parties to the said deed are not mentioned in the said memorial. Their names are merely stated as William Williams, Lewis Ambrose Williams, John Wick Bennet, Theophilus Howkins and Marian his wife, and Daniel Keane, when in fact the said deed purports to be an indenture made between William Williams and Lewis Ambrose Williams of the first part, John Wick Bennet of the second part, Theophilus Howkins and Marian his wife of the third part, and Daniel Keane of the fourth part; and the said memorial does not describe the*

deed as an indenture between parties, but as if it were a deed-poll, and as if all the parties named as parties to the said deed were grantors of the said annuity.

"4. *The said deed was not executed by the said Theophilus Howkins and Marian his wife and Daniel Keane, or any or either of them, and they were therefore not parties to the deed, and ought not to have been so described.*

"5. *The said Marian Howkins was at the date of the deed a married woman, and could not in law be a party to a deed; and the memorial is defective in describing her as such.*

"6. The names of the witnesses to the said deed are not inserted in the said memorial. The said deed was witnessed by Francis Nethersole Cates, who signed the attestation 'Fras. N. Cates,' and Frederick Herbert Calcott, who signed the attestation 'F. H. Calcott;' and the names of the witnesses inserted in the said memorial are, 'Fras. M. Cates,' 'J. H. Callcott,' 'Wm. Williams,' and 'Lewis A. Williams.' There were two witnesses to the said deed, that is to say, the said Francis Nethersole Cates and Frederick Herbert Calcott, and not four, as stated in the said memorial.

*"7. The annuity was granted for sixty years, if the defendant should so long live, and not for the life of the defendant, as [*536 stated in the memorial.

"8. The consideration was not paid as stated in the memorial. The only consideration paid for the said annuity was 3486*l.* and not 4000*l.*, as stated in the said memorial.

"9. Some of the notes and gold mentioned in the memorial, that is to say, the 500*l.* note, one of the 100*l.* notes, one of the 10*l.* notes, and 4*l.* of the gold, were returned to and retained by the said Daniel Keane, the solicitor and agent of the plaintiff, at the time of the execution of the said deed, in pursuance of a previous arrangement, and cannot therefore be said to have been paid to the grantors of the annuity as the consideration for the annuity."

The pleadings in this action, and the documents contained in the appendix, were to form part of the case; and the court was to be at liberty, if it should think fit, to draw such inferences from the facts stated as a jury might have drawn.

The questions for the opinion of the court are,—first, whether the grant of annuity was void on any of the grounds stated in the list of objections,—secondly, whether the deed and contract were void for usury,—thirdly, whether the plaintiff was entitled to recover from the defendant all or any and what part of the consideration-money for the said annuity.

The verdict and judgment were to be entered in such manner and for such amount as the court should direct.

Lush, Q. C., for the plaintiff.—The first question is, whether the annuity deed is void. The first objection urged is, that the memorial does not describe the nature of the deed; for, that the only instrument *described in the memorial is a grant of annuity, and the deed [*537 is not a grant of annuity. The deed purports to be an indenture between William Williams and Lewis Ambrose Williams, of the first part, John Wick Bennet, of the second part, Theophilus Howkins and Marian his wife of the third part, and Daniel Keane of the fourth

part: it recites the property to be charged, the agreement for the grant of the annuity, and a covenant for payment, and then assigns the lease from Bennet to the Williamses, and conveys the Swansea estate by way of security. The whole effect of the indenture is, to grant an annuity to Howkins and wife. The 2d section of the 53 G. 3, c. 141, enacts, that, "within thirty days after the execution of every deed, bond, instrument, or other assurance, whereby any annuity or rent-charge shall be granted for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, a memorial of the date of every such deed, bond, instrument, or other assurance, of the names of all the parties and of all the witnesses thereto, and of the person or persons for whose life or lives such annuity or rent-charge shall be granted, and of the person or persons by whom the same is to be beneficially received, the pecuniary consideration or considerations for granting the same, and the annual sum or sums to be paid, shall be enrolled in the High Court of Chancery, in the form or to the effect following, with such alterations therein as the nature and circumstances of any particular case may reasonably require; otherwise every such deed, bond, instrument, or other assurance shall be null and void to all intents and purposes." In the second column of the form of memorial there given, under the head "Nature of instrument," are the words "Indentures of lease and release, Bond in penalty of 1200*l.*, Warrant of attor-
*538] ney to confess *judgment on the same bond." But no section in the act says that the grant shall be by deed, or that a particular description of the instrument shall be given. This very point has been twice discussed and decided in the Court of Queen's Bench. The first case was that of Butler *v.* Capel, 2 B. & C. 251 (E. C. L. R. vol. 9), 3 D. & R. 485 (E. C. L. R. vol. 16). There, in the memorial of an annuity enrolled pursuant to the statute, an instrument was described as an assignment of certain leasehold premises: the instrument was in fact an underlease; and it was held that the description given was a sufficient compliance with the statute,—the court saying, "The schedule of the 53 G. 3, c. 141, requires that the nature of the instrument should be inserted; and that is satisfied by a description of the instrument in popular language, although that be not according to its strictly legal effect." And in Browne *v.* Lee, 6 B. & C. 689 (E. C. L. R. vol. 13), 9 D. & R. 700 (E. C. L. R. vol. 22), it was held that an instrument which contained, besides covenants to pay the annuity, also an assignment of stock to secure the same, was sufficiently described as "a grant of an annuity." It was objected that the nature of the whole instrument ought to be set out: but Bayley, J., in his judgment, said: "The enacting clause does not in terms require the nature of the instrument to be described; but the schedule which follows this clause contains several columns, one of which is headed 'Nature of the instrument,' and under that head there is given an instance of the description of the nature of the instrument which the statute requires, viz. 'Lease and release,' 'Warrant of attorney to confess judgment,' 'Bond in penalty.' *The statute imposes no obligation on the parties to describe the property on which the annuity is secured.* The object of the statute was, that such a description should be given as to enable a party, on looking at the
*539] memorial, to claim a copy under the 5th section." The words *'grant of an annuity' are as true a description of the nature

of an instrument by which an annuity is secured, as the words 'lease and release.' They convey as much information as the legislature intended to be conveyed by the description of the nature of the instrument, within the meaning of this act of parliament.(a) [*O'Malley*, Q. C., for the defendant, here intimated that he abandoned that objection, as well as the second, third, fourth, and fifth.]

The sixth objection is, that the names of the witnesses to the deed are not truly inserted in the memorial,—that is, the signatures of the witnesses (by initial) are copied, and not the names of the witnesses; and that there were but *two* witnesses to the deed, and the names of *four* appear in the memorial. The mistake arose thus,—the two Williamses signed the acknowledgment for the consideration-money in such a way that the clerk who copied it took them to be additional witnesses. This defect is cured by the 7 G. 4, c. 75, which recites that "it frequently happens that the names of witnesses to grants of annuities or other assurances are unknown to the grantees thereof or to their solicitors or agents otherwise than as they appear by the subscriptions of such witnesses to the attestations of the execution of such grants or assurances, and it might greatly endanger the validity of any such assurance if any name were inserted in the memorial thereof as the name of any such witness in any other manner than as the same appears signed by such witness as attesting the execution of such assurance; and that a very great number of memorials of grants of annuities have since the *passing of the said act [53 G. 3, c. 141] been enrolled, [*540 in which the surnames of witnesses to the deeds, instruments, or assurances specified in such memorials have been inserted together with such initial letter or abbreviation of the Christian names of such witnesses as appeared subscribed to the attestation by such witnesses of the execution of such deeds, instruments, or assurances, without stating at full length the Christian names of such witnesses; and that doubts have been entertained whether, according to the true construction of the said act, it is necessary to the validity of any such grant or other assurance that the Christian as well as surnames of all the witnesses to such deed, grant, or other assurance should be inserted in the memorial thereof in any other manner than as the same may appear subscribed to the attestation of such deed, grant, or other assurance by such witness respectively,"—and, in order to remove such doubts, enacts and declares, "that, by the said act of 53 G. 3, no further or other name or names of the subscribing witness or witnesses to any deed, bond, instrument, or other assurance, whereby any annuity or rent-charge is or may be granted, is or are required in the memorial thereof besides the names of all such witnesses as they shall appear signed to the attestations respectively of the execution of such deed, bond, instrument, or other assurance; and so the said act shall be deemed, construed, and taken." [WILLES, J., referred to Gibbs *v.* Hooper, 9 Simons 89, where the memorial of an annuity stated that the grantee's execution of the deed was attested by three persons whose names it mentioned, but the name of only one of them was endorsed on the deed; and it was held that the grant of the annuity and all the securities for it were void.] There, the names so introduced were those of entire strangers: here, the Wil-

(a) And see Crowther *v.* Wentworth, 6 B. & C. 366 (E. C. L. R. vol. 13), 9 D. & R. 286 (E. C. L. R. vol. 22), and Cane *v.* Lovelace, 2 B. & Ad. 767 (E. C. L. R. vol. 22).

*541] liamses are the granting parties, and *nobody could be misled. There is no pretence for that objection.

The seventh is a very subtle objection: it is, that the annuity was granted for sixty years, if the defendant should so long live, and not for the life of the defendant, as stated in the memorial. [*O'Malley.*—That objection is disposed of by the case of Barber *v.* Gamson, 4 B. & Ald. 281 (E. C. L. R. vol. 6), where it was held, that, in the memorial, it is sufficient to state that the annuity was granted for the lives of A. B., &c. (naming them), without adding that it was granted for their joint lives or the life of the survivor, or for a term of years determinable on those lives.]

The eighth objection is that the consideration was not paid as stated in the memorial,—the consideration paid for the annuity being 3486*l.* only, and not 4000*l.*, as stated in the memorial. Even if there had been a return of part of the consideration-money here, that would be no ground for avoiding the deed, though the court might have set aside the securities, upon terms. It is clearly no ground of answer by way of plea to an action on the deed. The ninth is the same objection substantially, though in a different form.

Then, as to the alleged usury. The first proposal of the grantees' solicitor was that the grantors should pay 8 per cent. interest, and that the principal should be secured upon Mr. Bennet's Swansea property. This was objected to by the grantors' solicitors on the ground that the transaction would be void for usury. It was consequently abandoned; and in lieu of it, an annuity deed in the ordinary form was proposed, in which the annuity only is secured upon the land, the only security for the principal being the policy of assurance on Mr. Bennet's life. The collateral security for the principal does not make the securities void. [WILLES, J.—Your best point is, that the principal is put in jeopardy.] It is.

*542] **O'Malley*, Q. C. (with whom was *The Common Serjeant*), for the defendant.—As to the sixth objection, the 7 G. 4, c. 75, is conclusive with regard to the names of the witnesses being set out by initials. But still the addition of the two names is fatal. In considering this objection, the court cannot look at who are the parties whose names are thus added, or whether their insertion in the particular case is calculated to embarrass or mislead. The only question is, whether the requirement of the statute has been complied with. "The object of the legislature," says Vice-Chancellor Shadwell, in Gibbs *v.* Hooper, 9 Simons 92, "in requiring the several particulars mentioned in the act to be set forth in the memorial, was, to enable any person who might be desirous of inquiring into the transaction to ascertain what the res gestæ of it really were: and, in my opinion, that object is not complied with, when, in addition to the names of the persons who did witness the transaction, the names of other persons are introduced into the memorial. Such a misstatement would lead to endless trouble and confusion, by inducing a person desirous of inquiring into the transaction to apply for information to persons who were entire strangers to it. Moreover, the memorial would contain an untrue representation of the res gestæ of the transaction; and the public would be deceived, if the parties were allowed to represent that the transaction had the sanction of two persons, both, perhaps, of the greatest respectability, but who were wholly

ignorant that any such transaction had taken place." Suppose, instead of two additional names, there had been fifty,—could it be said that the statute was complied with? In Hart *v.* Lovelace, 6 T. R. 471, the memorial stated that the indenture, bond, and warrant of attorney "were all attested by and executed in the presence of A. B. and C. D., *or one of them*," and it was *held to be insufficient,—Lord Kenyon saying: "I cannot get over the objection that the names of [*543 the witnesses to each of the deeds are not set forth with sufficient accuracy in the memorial: and this objection applies to the indenture as well as to the bond and warrant of attorney. The legislature, in framing this act of parliament, intended that every circumstance relating to the annuity should be disclosed: and more information is likely to be collected on the subject if all the witnesses to the different instruments be set forth in the memorial than if only some of their names be there mentioned; for, some important parts of the transaction may perhaps be known only to the witnesses to one of the instruments. In this memorial, the names of the witnesses are not distinctly set forth; if we allow this mode of stating their names to be sufficient, it will be difficult to draw the line: and in the next case it may be alleged in the memorial 'that the different instruments were executed in the presence of an hundred witnesses (naming them), some or one of them.'" That is quite in point.

The consideration for the annuity is not truly stated in the memorial. No doubt, if the objection had been that part of the consideration-money had been retained or returned, it would only have been ground for setting aside the deed upon terms. But the question here is, whether the memorial truly states the consideration paid for the annuity. The memorial should so state the consideration as to disclose at once the rate of interest charged. Instead of 4000*l.*, the true consideration paid was only 3486*l.*; and therefore, instead of paying 12½ per cent. interest, the grantors are made to pay more than 14½ per cent. The nominal consideration was made 4000*l.* for the express purpose of giving back 400*l.* to the solicitor who negotiated the transaction. This is a clear evasion of *the act of parliament. [ERLE, C. J.—The line drawn [*544 in the cases seems to be this,—was the whole consideration-money ever in the power and under the control of the borrower? WILLES, J.—The precise point arose in Hill *v.* Fox, 4 Hurlst. & N. 359.† There, the defendant being indebted to the plaintiff and other persons for money lost by betting on a horse-race, applied to the plaintiff for a loan. The plaintiff lent the defendant 2000*l.* upon the security of a deed which assigned to the plaintiff certain policies of assurance, and contained a covenant by the defendant to pay the 2000*l.* and interest. On the settling day, the defendant paid the plaintiff his bets out of the 2000*l.* In an action by the plaintiff on the covenant, the defendant pleaded that the deed was a mortgage security, part of the consideration for which was a gaming debt. At the trial the judge told the jury, that, if the 2000*l.* was advanced in pursuance of a stipulation or agreement between the plaintiff and defendant that out of it the plaintiff should be paid the money which he had won of the defendant by betting, it was a mere colourable loan and evasion of the statute; but that, if there was no such stipulation or agreement, and the plaintiff advanced the 2000*l.* as a loan for the defendant to dispose of it as he pleased, the

deed was valid, although the plaintiff expected to be paid out of the money so lent: and it was held by the Exchequer Chamber, on a bill of exceptions, that the direction was right.] Here, 400*l.* was immediately handed over to the solicitor pursuant to a previous agreement, which could have been enforced. Then, if the transaction be such that the deed is void, can the plaintiff recover back the consideration? *545] [ERLE, C. J.—The 6th section of the 53 G. 3, c. 141,(*a*) only *provides that the deed may be set aside on motion.] In Williamson *v.* Goold, 1 Bingh. 234 (E. C. L. R. vol. 8), where, upon the grant of an annuity, the agent of the grantee, on paying the consideration-money, retained or caused to be returned to him a considerable sum for the expense of deeds, investigating the title, journeys, &c. (two witnesses, brought from a considerable distance for the purpose of attesting the annuity deed, having first retired), the court held this an illegal retainer for which the grantee was responsible, and on that ground set aside the annuity ten years after it had been granted and acted on, though the grantee alleged that he had given no authority for and was ignorant of such retainer. The court there ignore the distinction between returning and retaining. [WILLES, J.—The facts of that *546] case are very differently reported in 8 J. B. *Moore 109 (E. C. L. R. vol. 17). WILLIAMS, J.—All the cases are collected in Mr. Lumley's book,(*b*) which is very accurate; but no trace is to be found of this having ever been set up as an answer to an action on the deed.] All the cases certainly appear to have been under the 6th section of the statute.

Then, as to the count for the consideration,—no doubt, where the annuity deed is set aside, the ordinary course is, to order the consideration to be returned. But the defendant was not the person who received the money: he was merely a surety for payment of the annuity. The first agreement proposed to make Bennet the principal and the Messrs. Williams the sureties; but this was objected to by the solicitors for the grantors, who prepared the second agreement, which, though not signed by the parties, was ultimately acted on as the basis of the transaction. In Straton *v.* Rastall, 2 T. R. 366, it was held, that, where an annuity bond granted by two becomes void by the neglect of the grantee in not registering a memorial under the statute, he cannot recover back any part of the consideration-money from the one who was known to be only a surety for the other, and had not in truth received any part of it, notwithstanding they both joined in signing a receipt for it. [ERLE,

(*a*) Which enacts, "that, if any part of the consideration for the purchase of any such annuity or rent-charge shall be returned to the person advancing the same; or, in case such consideration, or any part of it, shall be paid in notes, if any of the notes, with the privity and consent of the person advancing the same, shall not be paid when due, or shall be cancelled or destroyed without being first paid; or, if such consideration is expressed to be paid in money, but the same, or any part of it, shall be paid in goods; or, if the consideration, or any part of it, shall be retained on pretence of answering the future payments of the annuity or rent-charge, or any other pretence; in all and every the aforesaid cases it shall be lawful for the person by whom the annuity or rent-charge is made payable, or whose property is liable to be charged or affected thereby, to apply to the court in which any action shall be brought for payment of the annuity or rent-charge, or judgment entered, by motion, to stay proceedings on the action or judgment; and, if it shall appear to the court that such practices as aforesaid, or any of them, have been used, it shall and may be lawful for the court to order every deed, bond, instrument, or other assurance whereby the annuity or rent-charge is secured, to be cancelled, and the judgment, if any has been entered, to be vacated."

(*b*) Lumley's Life Annuities or Rent-Charges, 149 et seq.

C. J.—This point only becomes material if the deed be held void. We will hear you upon it if necessary.]

The transaction was clearly an evasion of the usury laws. In Doe d. Titford *v.* Chambers, 4 Campb. 1, it was held that an agreement, that, upon the advance of a sum of money by B. to A., A. should assign to B. the lease of premises of greater value, with a power of redemption on repayment of the money, and that in the mean time B. should grant A. an underlease of the *premises at a greater rent than the legal interest of the money,—A. insuring the premises and paying the ground-rent and taxes,—was usurious, and the assignment of the lease executed under such agreement void. Lord Ellenborough said: "The question here is whether this transaction was a contrivance to receive usurious interest for the loan of money. The defendant actually received 25*l.* a year beyond the legal interest of money. Therefore, if the assignment was intended as a security for the advance, and not as a purchase of the lease, it is void. Had there been a stipulation, that, upon the redemption, the 70*l.* a year should be brought into account, and interest in that case only taken at 45*l.*, the effect might have been different. But, as the deeds really stand, the defendant, had the premises been redeemed, would have received 70*l.* a year as interest upon the 900*l.* advanced. If he ran any risk, or the repayment of the principal was liable to any contingency, there would be no usury: but I see no risk or contingency involved in the transaction, except the solvency of the borrower. The latter was to insure the premises, to keep them in repair, to pay the ground-rent and all taxes. The covenant with regard to the property tax is void; but it shows the nature of the transaction. In short, the defendant advanced the money by way of loan: it was in contemplation of both parties that this should be repaid; it was never put in hazard; and interest above the rate of 5*l.* per cent. was to be paid for the forbearance. The assignment executed in pursuance of this agreement is therefore void." Doe d. Grimes *v.* Gooch, 3 B. & Ald. 664 (E. C. L. R. vol. 5), is to the same effect. There, a builder, having taken ground on a building lease at the ground-rent of 10*8l.*, assigned over his lease to A. for a sum considerably exceeding the then value of the premises, and at the same time took a lease from A. at *an increased rent of 39*5l.*, and containing the same covenants for building as the original lease, together with a stipulation that he should be allowed to repurchase the lease at the same sum for which it was assigned by him to A.: and it was held, that, under these circumstances, it was properly left to the jury to say whether this was a purchase or an usurious loan; and, the jury having found it to be the latter, the court refused to disturb the verdict. In Chillingworth *v.* Chillingworth, 8 Simons 404, A. applied to B. to lend him 400*l.* on mortgage of certain leasehold houses, but B. refused: it was then agreed that A., in consideration of the 400*l.*, should grant to B. two annuities of 21*l.* each, for forty years, to be issuing out of the houses: and it was held that the transaction was usurious. In Kenny *v.* Lynch, 8 Irish Equity Reports 207,—where the question was whether an annuity for a term of years certain, which would within the term repay the purchase-money and more than legal interest upon it, was usurious,—the Lord Chancellor (Sir E. Sugden) says: "There is no doubt that if the deed is a shift for the purpose of evading the statute, and the jury come to

[*547] [*548]

that conclusion, it would be void; for, it is not the form, but the substance of the transaction that would be regarded." The question is, was this a device whereby the lender was to obtain from the borrowers more than 5 per cent. interest, without the principal sum being jeopardized. There is no case where the transaction has been upheld, where there has been a stipulation that the borrower should pay premiums of insurance. [WILLIAMS, J.—Several. ERLE, C. J.—It is quite immaterial out of whose pocket the premiums come.] Where is the risk? [ERLE, C. J.—In Ex parte Naish, 7 Bingh. 150 (E. C. L. R. vol. 20), 4 M. & P. 793, this court refused to set aside a warrant of attorney *549] given to secure an annuity granted on *four lives, with a covenant on the part of the grantor to insure the principal sum within thirty days after the expiration of the third life. It was urged that it was a usurious contract, for the principal was never risked. But the court held that it did not appear to be a loan, but that the hazard was considerable; that, even if the insurance were effected, there are clauses in policies which induce considerable hazard; and that the mode of repayment was too precarious for the court to say the parties intended a loan. They therefore dismissed the rule for setting aside the warrant of attorney, with costs. The grantor, however, tried the question again in the Court of Exchequer,—Holland v. Pelham, 1 C. & J. 575,† 1 Tyrwh. 438,—by pleading that the agreement was usurious, to an action of covenant on the annuity deed. But, after argument, that court held, agreeably with the decision of this court, that the covenant for the insurance did not make the transaction usurious. The argument of Mr. Comyn was adopted, that it can make no difference whether the grantor pay the insurance, and therefore his annual payment be less, or the grantee, and then the annual payment will be higher.]

Lush, Q. C., in reply, was stopped by the court.

ERLE, C. J.—I am of opinion that none of the objections which have been urged in this case can be sustained, and therefore that our judgment must be for the plaintiff. We are not to regard this case as if it came before us upon a motion under the 6th section of the 53 G. 3, c. 141, to set aside the annuity: but the question is whether any of the points urged afford a defence to an action upon the deed. The statutes requiring a memorial of every grant of annuity to be enrolled, and *550] rendering the securities void for *non-compliance, have been very much considered: but most of the objections from time to time brought forward have been found to be untenable. The statute (s. 2), amongst other things, requires the memorial to contain "the names of all the witnesses" to the deed or other instrument whereby the annuity is granted. Here, the names of the witnesses are inserted with initials for their Christian names, as they appeared in the deed itself. This defect, if defect it was, is cured by the statute 7 G. 4, c. 75. Then it appears that there were two attesting witnesses to the deed, and that two of the parties to the transaction had signed the deed in such a manner as to induce the clerk who drew the memorial to suppose that they were witnesses, and so the memorial gave the names of four persons as witnesses attesting the execution of the deed. I think the reasoning of the case before Vice-Chancellor Shadwell is wholly inapplicable to the present. The opinion there expressed may be said to be extra-judicial. Circumstances might no doubt arise which would bring

a case within that dictum. But, here, the insertion of the two additional names was a mere blunder of the clerk, and does not come within the ground relied on in that case.

Upon the next point, much argument has been addressed to us which would have been very cogent if this had been a motion to set aside the securities. The question is whether the memorial truly states the consideration paid for the annuity. It appears from the case that the sum agreed to be paid for the annuity was 4000*l.*, and that that sum was handed over to the grantors, though with a perfect expectation on the part of the grantee's solicitor that 400*l.* of the money would be handed back to him for his services in procuring the money, and for the expenses of preparing the securities, together with a sum *paid for the year's premium on the insurance of the life of Mr. Bennet. [*551 I am of opinion that the true consideration was 4000*l.*, and that that sum was paid if it ever passed into the legal possession of the grantors or their agent. It appears that the full sum did so pass into the hands of the grantors, so that no one had a right to intercept any portion of it. It appears, however, that the money was paid under an arrangement that 400*l.* should be returned for the purpose before mentioned, and a further sum for the first year's premium. There are many cases which seem to show that that would be a breach of the statute of which the grantors might have availed themselves by motion under s. 6. But that question is not now before us. I think it affords no defence to this action.

The point mainly urged on the part of the defendant was, that this was a usurious transaction. A loan for more than 5 per cent. interest secured upon land is still void for usury: but, if the principal sum is not secured upon land, the usury laws have no application. Here, the principal money was not secured upon land. The grantors stipulate for the payment of an annuity, and the payment of that is secured on the land, but not the principal. It is said that this is only a cover and device to evade the usury laws, because the grantors covenant for the payment of the annuity for a period of sixty years, and part of the security was an insurance on the life of one of them, and the grantors contract to pay the premiums, and so the principal is never put in jeopardy. No doubt, the risk is extremely small: but it cannot be said that there is none. The insurance office might become insolvent, or the policy might become unavailing by reason of some of the many circumstances by which policies are vitiated. It seems to me that there is no foundation for the *objection. The law prohibits the securing an [*552 advance of money upon land at a higher rate of interest than 5 per cent.: and parties must take care not to violate the law. But it is a misapplication of language to call a transaction like this a device to evade the law. It is rather a case where the parties have obeyed the prohibition of the law, by taking a security which is outside of the prohibition. Upon the whole, I am unable to find any objection which ought to prevent the plaintiff from recovering in this action.

WILLIAMS, J.—I am entirely of the same opinion. As to the formal objection,—the only one which really gives rise to any difficulty,—that the memorial contains the names of two persons as witnesses whose names do not appear as witnesses on the deed, the case differs materially from that of Gibbs *v.* Hooper, 9 Simons 89, where Sir L. Shadwell,

V. C., intimated an opinion that there may be cases where the addition of names might be fatal. Here, the addition of the names of the two Williamses in the column in which the names of the witnesses ought to have been inserted, was due to a transparent blunder, the clerk who copied the names mistaking for witnesses two of the parties to the deed. I think such a mere blunder ought not to be allowed to invalidate the transaction.

As to the more substantial objection,—that the real consideration is not truly stated in the memorial,—it is contended the transaction is not correctly described as an advance of 4000*l.*, inasmuch as 400*l.* of it was returned to the solicitor who acted for the grantee, for procuration-money and expenses, and a further sum for the premium of insurance on Mr. Bennet's life. There are several cases in this court where the misconduct of the agent of the grantee in extorting an exorbitant sum for his charges, has been held good ground for setting aside *the annuity, though knowledge of the fact had not been brought home to the grantee himself. But it does not follow that it would afford a defence to an action on the deed. It is admitted that no instance can be found of a defence of that sort having been set up; and I am not inclined to establish a precedent for it.

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As to the last point,—that the transaction was void as being an evasion of the laws against usury. No doubt, in one sense, granting annuities *is* an evasion of the usury laws. But parties are entitled to evade the law. A man is guilty of no offence who so conducts his affairs as not to infringe an act of parliament. I see no objection to an evasion of the law in that sense. The usury laws do not apply where the principal is put in jeopardy. Here the principal was put in jeopardy. Reliance was placed upon the covenant to insure Bennet's life, as showing that the grantee incurred no risk of losing his principal. But still there is always a risk that the policy may turn out to be unproductive.

WILLES, J.—I am of the same opinion. As to the witnesses, it is perfectly obvious on looking at the memorial that the addition of the names of the two Williamses was a mere blunder. Nobody could be misled by it, and therefore the case Gibbs *v.* Hooper does not apply. As to the statement of the consideration,—it is said that the 4000*l.* was not the amount really advanced, but that sum less 10 per cent. for procuration-money and expenses, and the year's premium. As to that, the ruling of the Chief Justice in Hill *v.* Fox, 4 Hurlst. & N. 359,† confirmed by the Exchequer Chamber, is precisely in point. The statute 53 G. 3, c. 141, makes a distinction between return and retainer. Where part of the consideration-money has *been returned, the court may, under s. 6, order the securities to be set aside upon terms. That was the case of Williamson *v.* Goold, 1 Bingh. 234 (E. C. L. R. vol. 8), 8 J. B. Moore 109 (E. C. L. R. vol. 17). Then it is said that the transaction was void on the ground of usury, inasmuch as this was a shift or device to enable the grantee to obtain greater interest than 5 per cent. secured upon land. As an illustration of what has been said by my Brother Williams on this point,—suppose a loan of 100*l.* to be contracted for, of which 50*l.* was to be received in coals or a horse or some other commodity or chattel intrinsically worth 5*l.* only. That would be a mere shift to obtain usurious interest, and would be a

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case within the statute. It is clearly established, that, where the principal is put in jeopardy, the case is unaffected by the statutes against usury.

KEATING, J.—For the reasons already given, I entirely concur in the judgments pronounced by my Lord and two learned Brothers.

Judgment for the plaintiff on the first count; for the defendant on the second.

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*HONESS and Another *v.* STUBBS. *Jan.* 20. [*555

To a declaration containing three counts for three distinct libels, the court refused to allow the defendant to plead one general plea of justification.

THIS was an action for a libel. The declaration contained three counts for three separate libels charging the plaintiffs with swindling, and alleging special damage.

The defendants, in order to avoid the necessity of pleading a multiplicity of pleas, were desirous of pleading one general justification to the whole declaration, and for this purpose applied to Byles, J., at Chambers, for leave. The learned judge, however, declined to make the order, but referred the defendant to the court.

Grant now moved accordingly.—He submitted that the course proposed would save much needless expense, and offered to deliver to the plaintiffs full particulars of the intended defence.

WILLIAMS, J.—The difficulty is this,—if you set out in your pleas the facts upon which you rely, the court has an opportunity of judging whether they do amount to a justification or not; whereas, by the course proposed, you prevent the matter from getting on the record at all.

ERLE, C. J., and WILLES, J., concurring, Rule refused.

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*POWLE *v.* GANDY. *Jan.* 21. [*556

The 3 & 4 Vict. c. 24, s. 2, is not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12. Therefore, where, in an action of tort, the plaintiff recovered less than 40*s.* damages,—Held, that a certificate under the 12th section of the last-mentioned act, that it appeared to the judge at the trial that there was a sufficient reason for bringing the action in the superior court, did not entitle him to recover costs.

THIS was an action to recover damages from the defendant for an injury sustained by the plaintiff's vessel from a collision with a vessel of the defendant's in the river Thames. Plea, not guilty.

The cause was by arrangement tried before the secondary of London, when the jury returned a verdict for the plaintiff, damages 10*s.*, and the secondary, upon the application of the plaintiff's counsel, certified, under the 13 & 14 Vict. c. 61, s. 12, that it appeared to him at the trial that there was a sufficient reason for bringing the action in the court in which it was brought. The plaintiff's costs having accordingly been taxed and allowed,

Jacob, on a former day in this term, obtained a rule nisi for a review

of the taxation, on the ground, that, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, which he submitted was not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12, the plaintiff, having recovered less than 40*s*., was not entitled to costs.

Pearce now showed cause.—The plaintiff, it is submitted, is entitled to his costs, by virtue of the certificate given at the trial. The 11th section of the 13 & 14 Vict. c. 61, enacts, that, "if in any action commenced after the passing of this act in any of Her Majesty's superior courts of record, in covenant, debt, detinue, or assumpsit, not being an action for breach of promise of marriage, the plaintiff shall recover a sum not exceeding 20*l*., or if, in any action commenced after the passing
*557] of this act in any of *Her Majesty's superior courts of record, in trespass, trover, or case, not being an action for malicious prosecution, or for libel, or for slander, or for criminal conversation, or for seduction, the plaintiff shall recover a sum not exceeding 5*l*., the plaintiff shall have judgment to recover such sum only, and no costs, except in the cases hereinafter provided, and except in the case of a judgment by default;(*a*) and it shall not be necessary to enter any suggestion on the record to deprive such plaintiff of costs, nor shall any such plaintiff be entitled to costs by reason of any privilege as attorney or officer of such court or otherwise." Then comes the 12th section, which provides and enacts, "that if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which the said action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed." A certificate under this section clearly entitles the plaintiff to costs.

Jacob, in support of the rule.—The 2d section of the 3 & 4 Vict. c. 24 clearly disentitles the plaintiff to costs, unless there is a certificate such as is provided for by that section. The words are, "If the plaintiff in any action of trespass or trespass on the case brought or to be
*558] brought in any of Her Majesty's courts at Westminster, *&c., shall recover by the verdict of a jury less damages than 40*s*., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was really brought to try a right besides the mere right to recover damages for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

WILLES, J.(*b*)—I think that section is conclusive, and that this rule

(*a*) See 19 & 20 Vict. c. 108, s. 30.

(*b*) Erle, C. J., and Williams, J., were absent.

must be made absolute. The substantial question is, whether the 3 & 4 Vict. c. 24, s. 2, which was passed for the discouragement of trifling and frivolous suits, is repealed by the 13 & 14 Vict. c. 61, s. 12. This action is founded on a wrong within the description of those mentioned in the 2d section of the 3 & 4 Vict. c. 24, and, consequently, apart from the county court act the verdict being for a less sum than 40*s.*, in the absence of a certificate that the action was brought to try a right besides the mere right to recover damages, or that the grievance for which the action is brought was wilful and malicious, the plaintiff is not entitled to costs. Then comes the 13 & 14 Vict. c. 61. Now, when the scope and object of that statute are considered, it will plainly appear that it was not intended to repeal Lord Denman's Act. The object of the county court act was, to enforce the bringing in the county court all actions for wrongs (save certain excepted ones) which a jury might *estimate at a sum not exceeding 5*l.*: and, in order to bring about that, the 11th section deprives the plaintiff of costs where he brings his action in the superior court. The legislature, therefore, are dealing with cases in which but for that act the plaintiff would have been entitled to costs, and are not at all dealing with cases provided for by the 3 & 4 Vict. c. 24. Perhaps even that reasoning is unnecessary; for, the 11th section of the county court act says that a plaintiff recovering in a superior court a sum not exceeding 5*l.* in an action of tort over which the county court has jurisdiction, shall have no costs; and then the 12th section gives a right to costs in these terms,—"Provided that if the plaintiff shall in any such action as aforesaid recover a sum less than the sum in that behalf hereinbefore mentioned, by verdict, and the judge or other presiding officer before whom such verdict shall be obtained shall certify on the back of the record that it appeared to him at the trial that the cause of action was one for which a plaint could not have been entered in any such county court as aforesaid, or that it appeared to him at the trial that there was a sufficient reason for bringing the said action in the court in which such action was brought, the plaintiff in such case shall have the same judgment to recover his costs that he would have had if this act had not been passed." This statute does not affect to repeal the former. The rule to set aside the taxation of costs, which has taken place per incuriam, and to amend the judgment by striking out the award of costs, must therefore be made absolute. [*559

BYLES, J.—I am of the same opinion. There were two obstacles in the way of the plaintiff's recovering any costs in this case,—one, the statute 3 & 4 Vict. c. 24, s. 2, which provides that the plaintiff in an action of trespass or trespass on the case shall not be *entitled to any costs, where the damages recovered are less than 40*s.*, unless the judge or presiding officer shall certify on the back of the record in the manner therein mentioned,—the other, the 13 & 14 Vict. c. 61, ss. 11, 12, which provide that plaintiffs recovering in the superior courts sums not exceeding 20*l.* in actions of contract, or 5*l.* in actions of tort over which the county court has jurisdiction, shall have no costs, unless the judge or other presiding officer shall certify on the back of the record that it appeared to him at the trial that there was a sufficient reason for bringing the action in the superior court. Now, the second obstacle, viz., the enactment contained in the 11th section of the 13 & 14 Vict. [*560

c. 61, is removed by the certificate which the secondary has given under s. 12. But that still leaves the other obstacle in the way of the plaintiff; and not only so, but it fortifies the difficulty. I am clearly of opinion that this is not a case in which the plaintiff is entitled to costs.(*a*)

Rule absolute.(*b*)

(*a*) Erle, C. J., when the rule was moved, intimated a strong impression that the 3 & 4 Vict. c. 24, s. 2, was not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12.

(*b*) See the 34th sect. of the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 136, which enacts, that, "when the plaintiff in any action for an alleged wrong in any of the superior courts recovers by the verdict of a jury less than 5*l.*, he shall not be entitled to recover or obtain from the defendant any costs whatever in respect of such verdict, whether given upon any issue or issues tried, or judgment passed by default, in case the judge or presiding officer before whom such verdict is obtained shall immediately afterwards certify on the back of the record, or on the writ of trial or writ of inquiry, that the action was not really brought to try a right besides the mere right to recover damages, and that the trespass or grievance in respect of which the action was brought was not wilful and malicious, and that the action was not fit to be brought."

*561] *CHRISTIE v. BORELLY. *Jan.* 17.

The declaration alleged, that, in consideration that the plaintiff guarantied to the defendant that two bills of exchange of 100*l.* and 62*l.*, drawn by A. & Co. upon B. & Co., and both due on the 23d of January, 1859, would be paid by B. & Co. when due, the defendant, in return, guarantied to the plaintiff the repayment of 300*l.* towards the payment of goods which C. had ordered and was about to receive from the plaintiff. It then averred a general performance of all conditions precedent by the plaintiff, that the two bills were duly paid by B. & Co. when due, that the goods were delivered to C., and that C. had failed to pay for them; and assigned for breach non-payment of the 300*l.* or any part thereof by the defendant.

Plea, that, although the said sum of 300*l.*, repayment whereof the defendant guarantied to the plaintiff, was not by the terms of C.'s order payable until after the two bills became due, as the plaintiff and defendant at the time of the making of the mutual agreement and guarantees well knew; yet the said two bills were not duly or at any time paid by B. & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills:—

Held, on motion for judgment non obstante veredicto, that the performance of the plaintiff's promise to pay the two bills was not a condition precedent to his right to sue the defendant for non-payment of the 300*l.*, and consequently that the plea was no answer.

THIS was an action for an alleged breach of a guarantee.

The first count of the declaration stated, that, in consideration that the plaintiff guarantied to the defendant that two bills of exchange of 100*l.* and 62*l.*, both drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., 75, Lower Thames Street, and both due on the 23d of January, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guarantied to the plaintiff the repayment of the sum of 300*l.* towards the payment of Scotch whiskies, as follows,—6 puncheons, 5 hogsheads, 4 quarter-casks Auchtertool, 2 puncheons, 5 hogsheads, 8 quarter-casks Anderton, which Mr. B. Fisse, of Norris Street, had ordered and was about to receive from the plaintiff: Averment, that the plaintiff had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his the defendant's part of the said agreement; that the said two bills of exchange of 100*l.* and 62*l.* were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; that he

the plaintiff delivered to the said Mr. *B. Fisse the said Scotch whiskies in the said agreement hereinbefore mentioned; and that [*562 the said Mr. B. Fisse, although requested to pay the said amount of 300*l.* towards the payment of the said Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of 300*l.* or any part thereof, and the same still remained wholly due and unpaid: Breach, that the defendant had disregarded and broken his said promise, in this that he had not paid or caused to be paid to the plaintiff the said sum of 300*l.* or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

Second plea (to the first count), that, although the said debt and sum of 300*l.* in the said first count mentioned, repayment whereof the defendant engaged and guarantied to the plaintiff, was not payable, and by the terms of the said order of the said Mr. B. Fisse was not payable until after the said two bills drawn by Messrs. C. W. Olivier & Co. upon Messrs. Owen & Co., and guarantied by the plaintiff, became due and payable, as the plaintiff and the defendant at the time of the making of the said mutual agreement and guarantees well knew; yet the said two bills of exchange of 100*l.* and 62*l.* in the said first count mentioned were not duly or at any time paid or retired by the said Messrs. Owen & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue.

A verdict having been found for the defendant upon this issue at the trial before Cockburn, C. J., at the sittings in London after last Trinity Term,

Edward James, Q. C., in Michaelmas Term, moved for judgment non obstante veredicto.—He submitted that the question to be considered was, whether the consideration for the defendant's promise was the *agreement of the plaintiff or the performance of it; for that, if [*563 it was the performance that was the consideration, he could not contend that the case did not fall within the second rule in the notes to Pordage *v.* Cole, 1 Wms. Saund. 320 *b*, to bring the case within which the plea was manifestly framed: but he contended, that, upon the face of the guarantee, the price of the whiskies might be payable immediately on delivery; and he referred to Stavers *v.* Curling, 3 N. C. 355 (E. C. L. R. vol. 32), 3 Scott 740 (E. C. L. R. vol. 36), as a strong authority to show, that, where the breach may be compensated in damages, the court will so construe the contract. A rule nisi having been granted,

Petersdorff, Serjt., and *Garth*, now showed cause.—The performance of the contract by the plaintiff, viz. the payment of the bills in case Owen & Co. did not pay them at maturity, was to precede the performance of the defendant's engagement to pay the 300*l.* towards the price of the Scottish whiskies. Such was the natural order of events, and such is the construction which the plaintiff himself, by his general averment of performance of all conditions precedent on his part, has put upon the guarantee. In all cases of this description, the court endeavours to ascertain the intention of the parties, as it appears on the face of the contract itself. "The rule," says Tindal, C. J., in Stavers *v.* Curling, 3 N. C. 368 (E. C. L. R. vol. 32), 3 Scott 754 (E. C. L. R. vol. 36), "has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other is to be determined by the intention and

meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case." In Johnston *v.* Nicholls, 1 C. B. 251 (E. C. L. R. vol. 50), 14 Law J., C. P. 151, where the question was as to the sufficiency of the consideration *to
*564] support the promise laid in the declaration, the promise was thus alleged,—that, in consideration that the plaintiff would continue certain dealings which they had had with Messrs. Claridge & Co., the defendant promised the plaintiffs to be responsible and guaranty them the payment of any sums of money in which Messrs. Claridge & Co. then were, or at any time thereafter might be, indebted to the plaintiffs in the course of such dealings: and Maule, J., said (14 Law J., C. P. 156), —"These words in fact amount to this, that, in consideration that the plaintiffs would do something in futuro, the defendant promised to do something in futuro likewise." That is this very case. The meaning of the contract which the defendant is alleged to have entered into is,— "If you, the plaintiff, will pay the two bills drawn upon Messrs. Owen & Co., in case they are not duly honoured by them, I will pay 300*l.* towards the amount of the Scotch whiskies ordered by Fisse." The case of Thorpe *v.* Thorpe, 1 Salk. 171, and the notes to Pordage *v.* Cole, 1 Wms. Saund. 320 *b*, have laid down certain tests by which to ascertain whether performance on the one side is a condition precedent to a right of action on the other. The first is,—"If a day be appointed for payment of money or part of it, or for doing any other act, and the day *is* to happen, or *may* happen, *before* the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for, it appears that the party relied upon his remedy, and did not intend to make the *performance* a condition precedent: and so it is where *no time* is fixed for performance of that which is the consideration of the money or other act." The present case does not come within either of those conditions. The third is, that, "when a day is appointed for the pay-
*565] ment of *money, &c., and the day is to happen *after* the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance." The thing to be performed here, is, the plaintiff's promise to guaranty the payment of the bills by Owen & Co.; and that is to be performed before the arrival of the time at which the defendant's promise was to be redeemed. [WILLES, J., referred to Bowes *v.* Croll, 6 Ellis & B. 255 (E. C. L. R. vol. 88).] Taking the contract as set out upon the record, it is manifest that the performance of the contract on the part of the plaintiff was to precede the performance of the defendant's contract. [WILLES, J.—In Thomas *v.* Cadwallader, Willes 496, where a lessee covenanted to repair, the lessor allowing and assigning timber for that purpose, it was held that it was a condition precedent to his right to sue the lessee for a breach, that the lessor should find and assign timber; but that was explained by the Chief Justice to be because the one covenant related to the other, and the lessee could not repair until the timber was assigned to him for such repairs. "But," says his Lordship, "when two covenants in a deed have no relation to each other, I was clearly of opinion that the non-performance of one could not be pleaded in bar to an action brought for the breach of another covenant in the same deed; and for this plain reason, amongst others, that the

damages sustained by the breach of one such covenant may not be at all adequate to the damages sustained by the breach of the other."] The distinction between a partial and a total failure of consideration is noticed in Franklin *v.* Miller, 4 Ad. & E. 599 (E. C. L. R. vol. 31), in accordance with the rule laid down by Lord Mansfield in Boone *v.* Eyre, 1 H. Bla. 273(*a*). [WILLIAMS, J.—I do not see what answer the plaintiff would have had, if he had neglected to pay *the bills on Owen & Co.'s default, and the defendant had brought an action against him.] [*566

Grant (for *James*), in support of the rule, referred to Glazebrook *v.* Woodrow, 8 T. R. 366. He was then stopped by the court.

ERLE, C. J.—I am of opinion that the plaintiff is entitled to have this rule to enter judgment for him non obstante veredicto made absolute. The question is whether the promises stated in the declaration are independent promises or are mutually dependent on each other,—whether the performance of each was to be the consideration for the performance of the other. It appears to me that they are independent covenants. The plaintiff guaranties that the bills drawn by Olivier & Co. upon Owen & Co. shall be paid by the acceptors at maturity; and the defendant to the extent of 300*l.* guaranties that the whiskies shall be paid for by the purchaser, Fisse. It appears, therefore, that the damages for the breach of contract on the one side would be materially different from those for a breach on the other side: on the one side 162*l.*, on the other 300*l.* The strong probability, therefore, as apparent from the contract itself, is, that it was not intended that the performance of the stipulation on the part of the plaintiff should be a condition precedent to the performance of that on the part of the defendant. It is entirely a question of fact, that is, of the interpretation of the contract the parties have entered into, and of what was their intention. The rules of law referred to are entirely assented to: the only dispute is as to their application. The construction I put upon this contract is, that the promises are not mutual, but independent promises; and consequently that the second plea affords no answer to the declaration.

*WILLIAMS, J.—I am of the same opinion. The rules for determining what are and what are not conditions precedent are now well established. They are made with the declared object of discovering the intention of the parties. They are not inflexible, or to be applied when from the context or the nature of the agreement the application of them would frustrate the intention of the parties. If the undertaking on the part of the plaintiff had been an absolute undertaking to pay the bills at maturity, the case might have been different. But what the plaintiff undertakes to do is, not to pay a certain sum on a certain day, but only that he will guaranty the defendant against the consequences of a default on the part of Messrs. Owen & Co. in paying the bills at maturity. Thus, the thing to be done by the plaintiff is not stipulated to be done on any particular day, but when the amount is ascertained. The very nature of the contract, therefore, shows that it was not intended that the performance by the plaintiff of the contract on his part should be a condition precedent to the performance by the defendant of his contract. It was obvious that Messrs. Owen & Co., though they might fail to pay the bills on the day on which they became due, might have afterwards retired them, and so nothing would be due [*567

from the plaintiff; or but a small portion only of the amount might have been left unpaid by those parties.

WILLES, J.—I am of the same opinion. It appears to me that it was the promise only on the one side which was the consideration for the promise on the other, and not the performance. The second plea, therefore, is bad, and the rule for entering judgment for the plaintiff non obstante veredicto must be made absolute.

KEATING, J., was sitting in the divorce court. Rule absolute.

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*568] *RICHARD CHAMBERS EDDLESTON, Appellant; FREDERICK FRANCIS, Respondent. *Jan.* 17.

By the 51st section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the local board are empowered, on the owner's default after notice, to provide certain necessary house accommodations, the expense of which is to be recoverable in a summary manner from the owner, the amount to be ascertained by and recovered before two justices,—s. 129.

By the 11th section of Jervis's Act, 11 & 12 Vict. c. 43, in all cases where no time is specially limited for making or laying the complaint or information, it must be done within six calendar months from the time when the matter of complaint or information arose:—

Held, that a complaint under the Public Health Act, 1848, must be made within six calendar months of the work being done and notice of the amount due being given to the party, and not within six months of the demand of payment.

Quære, whether a "receiver" appointed by the Court of Chancery is an "owner" within the 11 & 12 Vict. c. 63, s. 2?

The provision in the 21 & 22 Vict. c. 98, s. 62, as to the time for taking proceedings by a local board for the recovery of expenses incurred under the Public Health Act, 1848, is prospective only.

THIS was an appeal against the dismissal of an information laid by Richard Chambers Eddleston, clerk to the local board of health, Nantwich, for and on their behalf, against Frederick Francis, by Thomas Fletcher Twemlow, William Baker, and Samuel Cross Starkey, three justices acting in and for the Nantwich division of the county of Chester.

The following case was stated by the justices, pursuant to the statute 20 & 21 Vict. c. 43:—

"On the 19th of January, 1858, an information and complaint was made and preferred by the appellant before the Rev. Thomas Brooke against the respondent for non-payment of 14*l.* 16*s.* 6*d.*, being a balance due for certain works of private improvements done in October, 1853, to houses at Nantwich under s. 51 of the Public Health Act, 1848, which case was fixed for hearing at the special sessions, Nantwich, on the 26th of January last, when Mr. Brooke appeared for the respondent, and objected to the magistrates' jurisdiction,—first, on the ground that the complaint was not made within the time limited by law and by s. 11 of the 11 & 12 Vict. c. 43, which enacts, "that, in all cases where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information, in the act or acts of parliament relating to each particular case, such complaint shall be
*569] made and such information shall be laid within six *calendar months from the time when the matter of such complaint or information respectively arose;" nor in accordance with the decision of the

judges in the case of The Queen *v.* The Leeds and Bradford Railway Company, 21 Law J., M. C. 193,—secondly, that the said Frederick Francis is not, nor was he for more than six calendar months before the said complaint was made, the owner or occupier of the premises mentioned in the said complaint, as required by the Public Health Act, 1848,—thirdly, for other good and sufficient reasons: on which the case was adjourned until the 23d of February last, when the appellant applied for a further adjournment until the 23d of March last, which adjournment was granted. The magistrates present on that day were of opinion that the information should be dismissed; but, at the request of the appellant, who stated he wished it heard before a larger bench of magistrates, it was again adjourned to the 6th of April last, on which day the respondent's attorney was unable to attend in consequence of illness; but, to save the expense of witnesses being under the necessity of attending again, the appellant called his clerk to prove the posting of two notices to a Mr. Joseph Woolf, of Haslington Hall, in Cheshire, who acted as agent for the respondent, which said notices were dated respectively the 23d of April, 1853, requiring the works to be done by the respondent.

"On Mr. Woolf being called, the notices were shown to him, and he proved that he received copies of them from the appellant, and wrote to the respondent on the 4th of May, 1853, as to the same, and that he also saw the respondent at the Rising Sun at Westaston on the 19th of May, 1853, when he handed the notices over to him.

"The case was then adjourned until the 4th of May instant, when it came on for hearing before us. The *respondent's attorney [*570 handed in a written notice of the foregoing objections to our jurisdiction to hear the case; and, after hearing the arguments on behalf of the appellant and the respondent, we were unanimously of opinion that the information should be dismissed, and therefore we dismissed it, on the ground that it appeared to me, the undersigned Thomas Fletcher Twemlow, that, so far back as 1853, certain permanent improvements were done by the direction and under the superintendence of the local board of health at a cost of 44*l.* 16*s.* 6*d.* upon houses in Nantwich belonging to a property over which the respondent had been appointed receiver by the Court of Chancery, and that for the raising the sum required a mortgage had been agreed upon and prepared between the local board of health and the receiver, which mortgage was never executed. For some time there was an account current kept between the builder and the board of health, and 30*l.* was paid by the receiver to the builder; but, the receiver having retired from the office, after various applications, finally, by letter dated December, 1857, declined to pay the sum of 14*l.* 16*s.* 6*d.* Then it was objected by the respondent's attorney that the complaint was laid too late under the 11 & 12 Vict. c. 43, s. 11: but I the said Thomas Fletcher Twemlow was of opinion that this objection should be overruled. On referring to the Public Health Act, 1848 (11 & 12 Vict. c. 63), I thought that the money should have been raised under s. 90; but, as it appeared that another mode of raising the money had been adopted, in a way not pointed out, as I thought, by the statute, I doubted whether the balance of the account came under the provisions of s. 129, which provides for the recovery in a summary way of damages and costs, and therefore I

agreed with the other justices in dismissing the said complaint. And
*571] we, the undersigned Samuel Cross Starkey *and William Baker being of opinion that the said complaint was not laid within the time limited by the 11 & 12 Vict. c. 43, s. 11, also dismissed the said complaint; when, the appellant being dissatisfied with our determination as being erroneous in point of law, on the 6th of May instant gave notice of appeal against the same under the 20 & 21 Vict. c. 43, s. 2, and the case is now signed by us."

The case was sent back to be restated by the magistrates, and was returned by them with the following additional statement by way of amendment:—

"On the 19th of January, 1858, complaint was made before a justice of the peace by the appellant, by the direction of the local board of health of Nantwich, under the 129th section of the Public Health Act, 1848 (11 & 12 Vict. c. 6), against the respondent, seeking to recover from him the sum of 14*l.* 16*s.* 6*d.* mentioned in the statement of facts; and the case was fixed to be heard on the 26th of that month. The hearing was, however, adjourned from time to time until the 4th of May, 1858, when it came on for hearing before the justices mentioned in the original case.

"The respondent's attorney then handed in a written notice of certain objections to the justices' jurisdiction to hear the case, which objections (with the exception of that one which arose during argument, to the effect that the local board of health had no power to adopt summary proceedings after having determined to declare the expenses a private improvement rate) are set out in the original case; and, after hearing the arguments on behalf of the appellant and respondent, the justices were unanimously of opinion that the information should be dismissed, and therefore dismissed it, on the grounds,—first, that it appeared to
*572] the undersigned Thomas Fletcher Twemlow, one of the justices *present, that, so far back as 1853, certain permanent improvements were done by the direction and under the superintendence of the local board of health at a cost of 44*l.* 16*s.* 6*d.*, upon houses in Nantwich belonging to a property over which the respondent had been appointed receiver by the Court of Chancery; that, for raising the sum required, a mortgage had been agreed upon and prepared between the local board of health and the receiver, which mortgage was never executed; that for some time there was an account current kept between the builder and the local board of health, and 30*l.* was paid by the receiver to the builder, but the receiver having retired from the office, after various applications, finally, by letter dated December, 1857, declined to pay the sum of 14*l.* 16*s.* 6*d.*; that then it was objected by the respondent's attorney that the complaint was laid too late, under the 11 & 12 Vict. c. 143, s. 11, but the said Thomas Fletcher Twemlow was of opinion that this objection should be overruled; that, on referring to the Public Health Act, 1848 (11 & 12 Vict. c. 63), the said Thomas Fletcher Twemlow thought the money should have been raised under s. 90; but, as it appeared that another mode of raising the money had been adopted, in a way not pointed out, as he thought, by the statute, he doubted whether the balance of the account came under the provisions of s. 129, which provides for the recovery in a summary way of damages and

costs, and therefore he agreed with the other justices in dismissing the said complaint.

"And the undersigned Samuel Cross Starkey and William Baker, the other justices present, being of opinion that the objections to their jurisdiction taken by the respondent's attorney as set out in the written notice handed in to them as before mentioned, were valid objections, also concurred with the said Thomas *Fletcher Twemlow, and [*573 dismissed the said complaint.

"The questions to be submitted for the opinion of the court were,—first, Was the complaint made within the time limited by law and the 11th section of the 11 & 12 Vict. c. 43,—secondly, Was the respondent the owner or occupier of the premises mentioned in the said complaint at the time it was made, on the 19th of January, 1858, as required by the Public Health Act, 1848, to give the justices jurisdiction to make an order,—thirdly, Had the local board of health any power whatever, after having agreed that the work should be done and the costs thereof declared private improvement expenses under s. 51 of the Public Health Act, 1848, and made the subject of private improvement rates under s. 90 of the same act, to be spread over a period of thirty years, to let the matter remain in abeyance from October, 1853, when the works were completed, until the 19th of January, 1858, long before which last-mentioned date the respondent had ceased to be the receiver, and then to adopt a new and different remedy, and endeavour to avail themselves of s. 129 of the said Public Health Act, 1848, to recover the 14*l.* 16*s.* 6*d.* by summary proceedings, instead of as a private improvement rate, to be paid in thirty years, as before mentioned."

The following statement of facts was also appended to the case, and was by agreement to be referred to as part thereof:—

"The Public Health Act, 1848 (11 & 12 Vict. c. 63), was applied to the township of Nantwich in the year 1850, and a local board of health duly formed thereunder.

"The appellant is clerk to such local board of health. In the year 1847, there was a suit in Chancery intituled William King and Edward Vincent against Thomas *Hector, Penelope Hammond, widow, [*574 and Penelope Hammond, spinster, and James Walthall Hammond, in which the respondent was appointed receiver of certain entailed estates to which the said James Walthall Hammond was entitled for his life, and also, after the determination of an estate for life, and of divers intervening estates tail, to the ultimate remainder contingent thereon.

"The premises in Nantwich to which the works the subject of the dispute were executed, form parcel of the said estates. All the time the respondent Francis was appointed receiver, there was a mortgage of 24,000*l.* secured on the interest of the said James Walthall Hammond in the property above mentioned; and in this mortgage the respondent's wife had an interest through her trustees, but the respondent himself had no direct beneficial interest. In the year 1853, a portion of the Nantwich property appeared to the local board of health, upon their surveyor's report, to be deficient in privy accommodation; and, in April in that year, notices were given to the respondent to do the necessary works within a time therein specified. These works were of a permanent nature. Upon receipt of notices dated the 23d of April,

1853, and a letter from the surveyor to the board, the respondent wrote to the surveyor proposing to the board that the works, if they were actually necessary, should be paid for by a private improvement rate under the acts, and declining to make himself personally liable for such permanent improvements, on the ground that he was only a receiver under the Court of Chancery, and might lose all interest in the property any day. The local board agreed that the works should be done and the cost thereof declared private improvement expenses under the 51st sect. of the act, and made the subject of private improvement rates
*575] under *s. 90, to be spread over a period of thirty years; the respondent on his part agreeing to advance the money to cover the expense of the same, upon security of a mortgage of the private improvement rates under the 107th section, to be repaid by thirty equal annual instalments of principal and interest. The works were done under the direction of the local board by Thomas Bowker, a builder, who completed them in October, 1853, at a cost of 44*l.* 16*s.* 6*d.* This amount actually became due to Bowker as soon as the works were completed in October, 1853. In pursuance of this arrangement, the local board proceeded to obtain the formal sanction of the general board of health to the borrowing of the amount, in accordance with s. 119 of the Public Health Act, 1848; which was granted, and bore date the 21st of April, 1854. In May, 1854, the mortgage of the private improvement rates upon the property to the respondent was drawn and submitted to him for perusal, who returned it with some remarks thereon. In the same month, the respondent was applied to personally by Bowker for payment of the 44*l.* 16*s.* 6*d.*; and, on the 25th of the same month, the respondent's agent paid over to Bowker a check of respondent's for 30*l.*, who gave a regular receipt for the same. The equity of redemption of the mortgaged estates was by an order of the Court of Chancery, dated the 16th of February, 1854, absolutely forcclosed; and the ultimate remainder in fee in the property became vested in the trustees of the respondent's wife upon the trusts mentioned in the will of her father Henry King. On the 7th of July, 1854, James Walthall Hammond, the tenant for life of the property, died, and Penelope, the wife of Edward Delves Broughton, late Penelope Hammond, spinster, became tenant for life of the property in question, with remainder to her son,
*576] now aged about ten years, as tenant in tail. Upon Hammond's *death, in July, 1854, the respondent ceased to be receiver, and to exercise any control or authority whatever over the property in question or the rents and profits thereof. On the 8th of March, 1855, the trustees of Henry King's will, with consent of the respondent and his wife, sold and conveyed to Broughton, in consideration of 5000*l.*, the ultimate contingent remainder in fee in the property which became vested in them on the foreclosure of the equity of redemption before mentioned, subject as aforesaid to the intervening life estate of Mrs. Broughton, and the said estates tail. On the 22d of March, 1855, Broughton, who had in right of his wife become interested as before mentioned upon the death of Hammond in the property in question, and entitled to receive the rents and profits thereof, refunded to the respondent the sum of 30*l.* so paid by him to Bowker in respect of the said works as aforesaid. The respondent gave Broughton, then a member of the Nantwich local board of health, a regular receipt for the same.

The local board of health contended that they had nothing to do with these transactions between the respondent and Broughton. No further step having been taken with regard to the proposed mortgage of the private improvement rates, the sanction which had been obtained for the same by the Nantwich local board of health was by them on the 18th of September, 1855, returned to the general board of health to be cancelled, which was done accordingly without the respondent knowing that such sanction had ever been sent up to be cancelled; nor did the respondent know, when the case was heard before the justices, that such sanction had been cancelled. The respondent was not applied to for the unpaid balance until the 10th of October, 1857, when the local board of health, by their clerk, the appellant, sent a letter, of which the following is a copy, to the respondent:—

*"Local Board of Health,
"Nantwich, 10th Oct. 1857. [*577

"Dear Sir,—This board has now been called upon by Mr. Bowker, builder here, for 14*l.* 16*s.* 6*d.*, balance of his account for works of private improvements to cottages in Wall Lane, part of the late Mr. Hammond's estate, done whilst in your possession in 1853; and I am instructed to request you will forward me your check for that amount. I find the amount was originally 44*l.* 16*s.* 6*d.* which has been reduced by your payment of 30*l.* on account thereof to the amount now claimed.
"F. FRANCIS, Esq." "RICHARD C. EDDLESTON."

To this application the respondent replied by letter of the 21st of December, 1857, of which the following is a copy:—

"Sir,—I beg to acknowledge the receipt of your application for 14*l.* 16*s.* 6*d.* for some improvement works on cottages in Wall Lane.

"You do not say how you make me liable for the payment; and I beg to say that I do not intend to pay the amount unless compelled to do so. If it should appear that I am liable, then I have a claim for reimbursement by Mr. Broughton. To save trouble and expense, I have thought it better to send him a copy of your application and this reply. I hope you will have no further trouble on the subject.
"R. C. EDDLESTON, Esq." "FREDERICK FRANCIS."

Hereupon Mr. Broughton was applied to, but declined to pay, on the ground that he was not liable.

Welsby, for the appellant.—The first question is whether the complaint was made in time. It was a complaint made on the 19th of January, 1858, under *the 129th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63, which enacts, "that, in all cases in [*578 which the amount of any damages, costs, or expenses is by this act directed to be ascertained or recovered in a summary manner, the same may be ascertained by and recovered before two justices, together with such costs of the proceedings as the justices may think proper; and, if the sums adjudged be not paid by the party against whom the adjudication is made, the same may be levied by distress and sale of his goods and chattels by warrant under the hands and seals of the justices making the adjudication." The complaint in question was in respect of the non-payment of expenses under s. 51, which enacts, "that it shall not be lawful newly to erect any house, or to rebuild any house pulled down to

or below the floor commonly called the ground-floor, without a sufficient water-closet or privy and an ashpit, furnished with proper doors and coverings; and whosoever offends against this enactment shall be liable to a penalty not exceeding 20*l.*; and if at any time, upon the report of the surveyor, it appear to the local board of health that any house, whether built before or after the time when this act is applied to the district in which it is situate, is without a sufficient water-closet or privy and an ashpit, furnished with proper doors and coverings, the said local board shall give notice in writing to the owner or occupier of such house, requiring him forthwith, or within such reasonable time as shall be specified therein, to provide a sufficient water-closet or privy and an ashpit so furnished as aforesaid, or either of them, as the case may require; and, if such notice be not complied with, the said local board may, if they shall think fit, cause to be constructed a sufficient water-closet or privy and an ashpit, or either of them, or do such other works as the
*579] case may *require; and the expenses incurred by them in so doing shall be recoverable by them from the owner in a summary manner, or, by order of the said local board, shall be declared to be private improvement expenses, and be recoverable as such in manner hereinafter provided." The 11th section of Jervis's Act, 11 & 12 Vict. c. 43, enacts, "that, in all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the act or acts of parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose." The question is whether the cause of complaint arises on the failure to comply with the notice to do the work, or on the failure to comply with the demand of payment of the expenses incurred by the surveyor in the doing of the work. Here, the notice to the respondent to do the works in question was dated the 23d of April, 1853; and the demand of payment was made on the 10th of October, 1857. By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), s. 73, all expenses incurred by the commissioners in respect of any dangerous structure shall be paid by the owner; and by s. 103 all expenses to be recovered in a summary manner may be recovered as directed by the 11 & 12 Vict. c. 43, by s. 11 of which complaint must be laid within six months from the time when the matter of such complaint arose. In Labalmondiere, app., Addison, resp., 28 Law J., M. C. 25, the owner of a dangerous structure not having taken it down, as required, pursuant to the former act, the commissioners took it down; and the amount of the expenses incurred was demanded of the owner, and refused. A complaint was laid before
*580] a magistrate for the non-payment of the *expenses, *within six months of the demand and refusal*, but beyond six months from the completion of the works: and it was held, that the matter of complaint was the non-payment of the expenses, and that the time of limitation ran from the demand, and not from the completion of the works, and therefore that the complaint was in time. Lord Campbell said: "It seems contrary to all reason to say that there was any liability or default in the respondent before application had been made to him, stating what the amount of expenses was, and demanding payment, although a demand is not expressly required by the statute. The six

months, therefore, had not elapsed when the complaint was laid." And Wightman, J., said: "The default alleged in the summons is, the non-payment of the amount of expenses after having been applied to for them." Here, the application by the board was made within six months from the day of laying the complaint. The 62d section of the Local Government Act, 1858, 21 & 22 Vict. c. 98, enacts, that, "where the local board have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable, either by application of or agreement with the owner, or by the Public Health Act, 1848, or any act incorporated therewith, or this act, the same may be recovered from the person who is owner of such premises when the works are completed for which such expenses have been incurred, in the manner provided by the Public Health Act, 1848, and such expenses shall be a charge on the premises in respect of which they were incurred, and shall bear interest at the rate of 5*l.* per centum per annum till payment thereof;" and that "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within such proceedings *may be taken shall be reckoned from the date of the service of notice of demand." [ERLE, C. J.—Does that apply to liabilities already incurred?] It is submitted that it does. [WILLIAMS, J.—According to the usual mode of interpreting acts of parliament, such a provision, in the absence of express words showing it was meant to be retrospective, would be held to apply only to future proceedings.] The matter of complaint here, it is submitted, is, the non-payment of the balance. The next question is, whether the respondent is not an "owner" within the meaning of the interpretation clause, s. 2, of the 11 & 12 Vict. c. 63,(*a*) by which it is provided that "the word 'owner' shall mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the said word is used, whether on his own account or as *agent* or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent." The facts are these:—The premises in question being under mortgage, and there being a suit pending in Chancery in relation to them, the respondent was appointed receiver in 1847. He ceased to be receiver in 1855, when Mr. Broughton bought the equity of redemption. At the time these expenses were incurred, therefore, the respondent was the party who received the rents of the estate: he alone could answer the description of "agent" or "trustee." [ERLE, C. J.—It would be rather a formidable construction of the act, to hold that a person employed to collect rents is to be treated as owner, and made liable for all improvements on the property.] The respondent was not a mere collector. [WILLIAMS, J.—If the receiver is not liable, it is difficult to see who is.] The remaining *question is, whether, after the negotiation which took place between the respondent and the local board in 1853, with reference to a private improvement rate under s. 90 of the 11 & 12 Vict. c. 63,(*b*) it was competent to the [*581 [*582

(*a*) Or, rather, whether he was the party properly chargeable when the works were done.

(*b*) Which enacts, "that, whenever the local board of health have incurred or become liable to any expenses which by this act are or by the said local board shall be declared to be private improvement expenses, the said local board may, if they shall think fit, make and levy upon the occupier of the premises in respect of which the expenses shall have been incurred, except

board to resort to their remedy under s. 129. [ERLE, C. J.—The respondent expected a private improvement rate for the reimbursement of the expenses, and a mortgage of that rate to him under ss. 107 and 119. A change of circumstances takes place, and he afterwards ceases to be the receiver. Why is he to be now charged as if he were the owner ?] The money not being recoverable by rate, it must be recoverable by summary proceeding under s. 129.

Huddleston, Q. C. (with whom was *Campbell Forster*), for the appellant.—The respondent was receiver of certain property, a portion of which is found by the local board of health to be deficient in accommo-
*583] dation. Notice is given to the receiver to remedy the defect. *He states that he has no beneficial interest in the premises; and thereupon the local board of health, upon the report of their surveyor, order the necessary work to be done. The expenses thus incurred were either recoverable from the owner by summary proceeding under s. 129, or by a private improvement rate under s. 90, which latter would be imposed upon the occupier, who, under s. 91, would be entitled to deduct a proportion thereof out of the rent payable by him to his landlord.(*a*) Here, the works in question were done in 1853, and all the circumstances were fully brought to the knowledge of the respondent in 1854, when the amount of the expenses was ascertained. Under
*584] these circumstances, it is impossible to say that a complaint *made in 1857 was made within the time prescribed by the 11th section of the 11 & 12 Vict. c. 43,—even if the rule laid down in Labalmondiere, app., Addison, resp., 28 Law J., M. C. 25, is adopted, viz. that the *demand* is the "cause of complaint." In The Queen *v.* The Justices of Shrewsbury, 31 Law Times 114, more than six months after a demand of immediate payment of a church-rate, which was not complied with, a second demand was made, and a refusal given. Three days after such refusal, a summons was taken out to levy the same by distress (under the 55 G. 3, c. 127, s. 7), which the justices dismissed on the ground that the matter of complaint arose more than six months before the summons (11 & 12 Vict. c. 43, s. 11). It was contended

in the cases hereinafter provided, in addition to all other rates, a rate or rates to be called private improvement rates, of such amount as will be sufficient to discharge such expenses, together with interest thereon at a rate not exceeding 5*l.* in the 100*l.* in such period not exceeding thirty years as the said local board shall in each case determine: Provided always, that, whenever any premises in respect of which any private improvement rate is made become unoccupied before the expiration of the period for which the rate was made, or before the same is fully paid off, such rate shall become a charge upon and be paid by the owner of the premises so long as the same continue to be unoccupied."

(*a*) The 91st section enacts, "that, if the occupier by whom any private improvement rate is paid holds the premises in respect of which the rate is made at a rent not less than the rack-rent, he shall be entitled to deduct three-fourths of the amount paid by him on account of such rate from the rent payable by him to his landlord, and, if he hold at a rent less than the rack-rent, he shall be entitled to deduct from the rent so payable by him such proportion of three-fourths of the rate as his rent bears to the rack-rent; and, if the landlord from whose rent any deduction is made under the provision last aforesaid is himself liable to the payment of rent for the premises in respect of which the deduction is made, and holds the same for a term of which less than twenty years is unexpired, but not otherwise, he may deduct from the rent so payable by him such proportion of the sum deducted from the rent payable to him as the rent payable by him bears to the rent payable to him, and so in succession with respect to every landlord (holding for a term of which less than twenty years is unexpired) of the same premises both receiving and liable to pay rent in respect thereof: Provided always, that nothing herein contained shall be construed to entitle any person to deduct from the rent payable by him more than the whole sum deducted from the rent payable to him."

that there was no demand *and refusal* until three days before the summons was taken out. But Erle, J., said,—"If I make a demand of immediate payment and don't get the money, is not that tantamount to a refusal? The application to the justices ought to have been made within six months of that demand." He was then stopped by the court.

ERLE, C. J.—I am of opinion that this appeal must be dismissed. It is sufficient to take the first objection relied on by the respondent, viz. that the complaint was not made in time, the 11th section of Jervis's Act, 11 & 12 Vict. c. 43, requiring it to be made "within six calendar months from the time when the matter of complaint arose." The matter of complaint here was the non-payment of the expense of certain improvements on premises of which the respondent was the receiver under the Court of Chancery, which improvements were begun and completed in 1853. Part of the money remaining unpaid, the complaint was preferred by the clerk of the local board of health on the 19th of January, 1858. The first *question then is, whether the proceedings were begun within six months of the cause of complaint. The appellant relies upon the fact, that, in October, 1857, he demanded of the respondent payment of the amount in dispute; and he insists that there was no matter of complaint until the sum payable for the works was ascertained and fixed, and payment thereof demanded; and the case Labalmondiere, app., Addison, resp., 28 Law J., M. C. 25, was cited. Now, it is perfectly clear, that, under this provision of the statute, the party should have notice of the amount which he is called upon to pay. Whether, after the amount has been fixed and ascertained, it is competent to the board to lie by and for several years abstain from making any demand, it is unnecessary to decide. But the question here is, has this debt, ascertained and due in 1853, become for the first time a debt recoverable in October, 1857? I am of opinion that it has not. It appears that Mr. Francis, being receiver of the property in 1853 and 1854, was applied to to be answerable for the expenses of these works, when he objected that he was a mere receiver, and therefore had no interest in respect of which he could be liable. Ultimately, an agreement was come to between him and the local board that the works should be done, and that the owner should not be looked to for the expenses, but that they should be defrayed by an improvement rate upon the occupier, under the 90th section of the Public Health Act, 1848, 11 & 12 Vict. c. 63. That agreement was come to in May, 1854, and it was proposed to effect a mortgage of the rate to Mr. Francis, under s. 107, and notice was given to him that the total sum due for the work was 44*l.* 16*s.* 6*d.*, and that the board looked to him for payment. Mr. Francis accordingly paid 30*l.* Now, it is clear to my mind that that must either be taken to be a notice of the *amount due, and a demand on Mr. Francis, so as to give the local board a right to proceed summarily against him under s. 129, or an agreement between the local board and him that the expenses should be a charge on the occupier in the shape of an improvement rate, and not upon the owner. If so, the local board clearly had no right in 1857 to change their option, and fall back upon Mr. Francis as owner, and call upon him to pay the balance: and especially are they estopped when Mr. Francis ceased to be receiver of the property in

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1854. If they had the option, they were bound to exercise it within a reasonable time. If the matter of complaint was the non-payment of the expenses when the amount was ascertained and notice thereof given to the party called upon, as I think it was, then, as all that took place in 1854, this proceeding is out of time. It is perfectly reasonable so to decide. The money is not in fairness due from the respondent at all. We therefore dismiss this appeal upon the merits. With regard to the 62d section of the Local Government Act, 1858, 21 & 22 Vict. c. 98, which provides, that, "in all summary proceedings by a local board for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand,"—I am clearly of opinion that that applies only to proceedings commenced after the passing of that act. For these reasons, I am of opinion that the appeal should be dismissed, with costs.

WILLIAMS, J.—I am of the same opinion. Without at all meaning to dissent from what has been said by the Lord Chief Justice upon the first point, I prefer resting my judgment on the ground stated by Mr. Twemlow. It appears to me, that, having elected to *proceed under the 90th section of the act, by an improvement rate upon the occupier, it was not competent to the local board afterwards to turn round and take proceedings summarily under s. 129. It is true no rate was in fact made. But the 30*l.* was obtained from the respondent upon the footing that he was to have a mortgage on the rate which they had agreed to make. Having consented to throw the burthen on the occupier, and that the respondent should be a mortgagee for the money advanced, I think the board are estopped from saying they are remitted to their right of shifting the burthen to the respondent.

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WILLES, J.—I am of the same opinion. If the proceeding towards charging the sum on the occupier by means of an improvement rate was operative, it was a final election by the board: if not, the notice to Mr. Francis operated as a demand of payment by him. I see no way of getting out of that dilemma.

KEATING, J.—I quite concur with the court in dismissing this appeal, and particularly on the ground taken by the Lord Chief Justice. There was such a demand in 1854 as would have entitled the local board to proceed in the summary way under s. 129, provided the respondent, as receiver, was the person chargeable. This decision is entirely in accordance with the merits. If the local board have lost their remedy for these expenses, they have only themselves to blame for not having made their election at an earlier period.

Appeal dismissed, with costs.

*588] *COUNT POURTALES GORGIER *v.* MORRIS. *Feb.* 25.

It being in contemplation to construct a railway from Verrieres to Thielle, in the canton of Neuchâtel, in Switzerland, and the plaintiff being a person of influence there, and desirous that the construction of such railway should be carried into effect, and having prepared certain plans and drawings for that purpose, and incurred expenses in relation to the proposed undertaking,—it was agreed between the plaintiff and the defendant and one Merrett, amongst other things, that the plaintiff would give his support and aid to the defendant and Merrett

for obtaining the concession or grant of the right of constructing such railway; that the defendant and Merrett would construct the railway; that they should be paid for their works in advance by means of the issue of shares in a company to be formed; that, with two-thirds of the capital, the defendant and Merrett should construct the railway, and that the remaining one-third should be remitted in free shares to the plaintiff; and that the shares so to be placed at the disposal of the plaintiff should cover all that might be due to the plaintiff as well for his trouble as for certain other expenses to be incurred by him.

Application was accordingly made for the concession: but, as two other persons, named Besnard and Beslay, were also endeavouring to procure the concession for themselves, it was ultimately arranged that all the parties should join in one application, which resulted in the grant of a concession to the defendant in conjunction with Messrs. Besnard and Beslay, Merrett, and one Lelievre; and a second agreement was entered into, to which Besnard and Beslay became parties, whereby it was, amongst other things, agreed that 35,600*l.* in free shares was to be allotted to the plaintiff for the care and trouble he had had up to that time, and which he might yet have to take up to the complete organization of the company. The defendant afterwards assigned his interest in the concession to a third person.

In an action against the defendant upon the above agreements, alleging for breach, that, by default of the defendant, the company had never been formed, and no free shares had been appropriated to the plaintiff:—Held, that there was no consideration for a binding promise on the part of the promoters of the undertaking to give the plaintiff the shares,—the mere expectation of future services of the plaintiff not being a valid consideration; and his past services not having been rendered for any payment or allotment of shares stipulated to be made in the event which had happened, of a joint concession to the defendant and his rivals.

THIS was an action upon a special agreement.

The first count of the declaration stated, that, before and at the time of making the agreement thereinafter mentioned, it was in contemplation to construct a railway through the canton of Neuchâtel, in Switzerland, from the frontier at Verriers to Thielle, with a branch and certain other works: that the plaintiff, being a person of influence in the canton, and desirous that the construction of the said railway should be carried into effect, and having prepared certain plans and drawings for that purpose, and incurred expenses in relation to the said proposed undertaking, procured the defendant and one George Merrett, who were contractors in England, to inspect the proposed line of railway, and afterwards to undertake the construction thereof, and for that purpose to make a proposal to the government of Neuchâtel for a concession or grant of the right of constructing such railway; and thereupon, *on the 15th of November, 1853, it was agreed between [*589
the plaintiff and the defendant and Merrett, amongst other things, that the plaintiff would give his support and aid to the defendant and the said George Merrett for obtaining the concession, and would use all his efforts, with the aid of his friends, to bring the matter of the granting of such concession to a good conclusion,—that the defendant and Merrett would construct the railway, &c.,—that payment should be made to the defendant and Merrett for their works in advance, by means of the issue of shares in a company, that is to say, a "Société Anonyme," which would be regulated by the laws of the canton, and of which the statutes were to be thereafter agreed upon,—that the capital of the said company should be formed as therein stated,—that, with two-thirds of such capital, the defendant and Merrett should make the railway, and that the remaining one-third should be remitted in free shares to the plaintiff of the same kind as those which would constitute the two-thirds,—and that the shares so to be placed at the disposal of the plaintiff should cover all that might be due to the plaintiff as well for his trouble as for certain other expenses to be incurred by him. The count then alleged that the defendant and the said George Merrett

and one Alphonse Lelievre applied for the said concession to the government of the canton, and that the plaintiff was always ready and willing to support and aid the defendant and the said other persons so applying, and to use his best endeavours to procure the granting to them of the said concession; and that afterwards it was agreed that other persons, to wit, Besnard and Beslay, should be associated with the defendant and Merrett and A. Lelievre in soliciting the said concession; that they all jointly applied for the concession, and that such application
*590] was aided and supported by *the plaintiff, and by means of the support and aid so afforded by the plaintiff a concession was made and granted by the government to the said Beslay, Besnard, the defendant, Merrett and Lelievre, for making the said railway, on certain terms which were approved and accepted by the plaintiff and the defendant and the said other persons. The count then went on to aver, that, it having become necessary to alter and readjust some of the terms of the before-mentioned agreement, by reason of the introduction of the said Messrs. Besnard and Beslay as parties to the said concession, afterwards, on the 19th of December, 1853, it was further agreed by and between the defendant, the said G. Merrett, the said A. Lelievre, the said Beslay, Besnard, and the plaintiff, that the defendant, Merrett, and Lelievre should take upon themselves the construction of the said lines of railway, for the fixed sum of 632,400*l.*, in consideration of which they engaged to construct the said railway, &c.; that, in consideration of 30,000*l.*, they should pay interest on the capital of 800,000*l.* &c.; that they should place to the credit of the company (meaning the said Société Anonyme to be formed as aforesaid) 12,000*l.*; that the said sums, making a total of 674,000*l.*, should be arranged as follows,—280,000*l.* were to be supplied by Besnard and Beslay; 90,000*l.* were to be represented by debentures, and the remaining 304,400*l.* in free shares of the said company; that the defendant, Merrett, and Lelievre were immediately to deposit the caution-money, 8000*l.*; that, of the 280,000*l.* to be furnished by the said Besnard and Beslay, three-fourths, or 210,000*l.*, were to be against shares in the said company, and one-fourth, or 70,000*l.*, against debentures of the company; that, besides the said shares and debentures, they should receive 90,000*l.* in free shares of the said company as concessionnaires and for
*591] the purpose *therein mentioned; that there should be issued 640,000*l.* in shares and 160,000*l.* in debentures, and that such capital should be apportioned as follows,—to the defendant, the said G. Merrett, and Alphonse Lelievre 662,400*l.*, to Besnard and Beslay 90,000*l.*, to the plaintiff 35,600*l.*, and to the credit of the said company for administration, &c., 12,000*l.*; and it was expressly agreed between all the said parties thereto that the said sum of 35,600*l.* should be allowed and appropriated to the plaintiff in free shares of the company, as a compensation for the pains and trouble which he had had up to the day of making the agreement, and which he might thereafter have to take up to the complete organization of the company: Averment, that, the said agreement having been so made, the defendant promised the plaintiff, that, on the formation and complete establishment of the said company, the said sum of 35,600*l.* should be allotted and apportioned to him in such free shares as aforesaid, and that the defendant would use his best endeavours that the said company should be formed and

established, and would do no act whereby the formation of the company and the appropriation of the said free shares to the plaintiff should be hindered or prevented: General averment of performance by the plaintiff of all things necessary to entitle him to maintain the action: Breach, that, although a reasonable time had elapsed for the forming and establishing the said company, and appropriating to the plaintiff the said free shares, the defendant broke his promise, in this, that he did not use his best or any endeavours to form the said company and procure the said shares to be appropriated to the plaintiff; and that, by default of the defendant, the said company had never been formed and established, and no free shares therein appropriated to the plaintiff, &c.

*The second count stated that the agreement of the 15th of November, 1853, having been made as mentioned and set forth in the first count, and the said agreement of the 19th of December, 1853, having also been made as mentioned and set forth in that count, and the other acts and circumstances in that count mentioned having been also done and happened,—which agreement, acts, and circumstances were for brevity's sake not repeated therein, but were intended to be incorporated into and to form part of that count by reference to the said first count,—the defendant promised the plaintiff, that, on the formation and complete establishment of the said company, the said sum of 35,600*l.* should be allowed and appropriated to the plaintiff in free shares of the said company, as and for such compensation as in the said agreement of the 19th of December is mentioned: Averment, that the plaintiff did all things on his part, and all things were done and happened, to entitle him to have the said sum of 35,600*l.* allowed and appropriated to him on the formation and complete establishment of the said company, in such free shares as aforesaid: Breach, that, although the said company was formed and completely established, and a reasonable time afterwards elapsed for allowing and appropriating to the plaintiff the said sum of 35,600*l.* in such free shares therein as aforesaid, and such free shares would have been of great value,—of all which the defendant had notice,—yet no part of the said sum of 35,600*l.* had been allowed and appropriated to the plaintiff in free shares of the said company, or been paid or allowed to him in any manner whatsoever: and the said company had been so formed and established, that, by the statutes regulating the institution thereof, no allowance or appropriation of any sum of money to the plaintiff in free shares therein could or would be made. [*592

*The defendant, amongst other pleas, pleaded non assumpsit, upon which issue was joined. [*593

The cause was tried before Erle, C. J., at the sittings in London after Trinity Term last, when it appeared that the action was brought for the recovery of 35,600*l.* from the defendant under the two agreements declared on, in respect of the plaintiff's services in obtaining from the government of the canton of Neuchâtel, in Switzerland, a concession of the right to construct a railway from Verrieres to Thielle, traversing the canton of Neuchâtel. The plaintiff was a person having considerable influence in the canton; and, having caused plans and drawings of the proposed railway to be made, he entered into the agreement of the 15th of November, 1853, set out in the first count of the declaration, with the defendant and Merrett; and, pursuant to the terms of that agree-

ment, the plaintiff caused application for the concession of the railway to be made. Messrs. Besnard and Beslay had also applied for a similar concession; and, in order to prevent competition, an amalgamation of the competing parties for the proposed railway was agreed to, which resulted in the agreement of the 19th of December, 1853, the terms of which were as follows:—

"December 19th, 1853.

"Between the undersigned,—first, Messrs. Morris, Merrett, and Lelievre, residing in London, &c.,—secondly, Mr. Beslay, residing at Paris, &c., acting for himself and in the name of Mr. Besnard,—thirdly, M. le Comte Pourtales Gorgier,—it has been agreed as follows:—

"Art. 1. Messrs. Morris, Merrett, and Lelievre take upon themselves the construction of the lines of railway in Neuchâtel, which form the subject of the agreement with the government of Neuchâtel, in
*594] Switzerland, dated the 29th of September last, ratified the *same day by a decree of the council of the same canton, that is to say, the line from Verrieres to Thielle, and the branches, &c., for the fixed sum of 632,400*l.*: in consideration of which they engage to construct and render in a complete and perfect state for working the railways above named, including the purchase of land, the construction of the permanent way, the works of art, the fixed material of every description, as well as the rolling stock, station-houses for guards, crossing junctions, closing, in short everything that constitutes the complete establishment of a railway fit for working, within the time prescribed by the act of concession. They moreover take upon themselves, in consideration of the sum of 30,000*l.*, to pay interest at the rate of 4 per cent. on the capital of 800,000*l.* during the construction of the works until the completion of the railway and its being in a state fit for working. They will also have to place to the credit of the company 12,000*l.*, of which mention is made in Art. 6. The three sums above stated, forming a total of 674,400*l.*, will be settled in the following manner,—first, 280,000*l.* in money will be supplied, on the terms stated in Art. 4, by Messrs. Besnard and Beslay,—secondly, 90,000*l.* in debentures,—and the remainder, 304,400*l.*, in free shares.

"Art. 2. Messrs. Morris, Merrett, and Lelievre are immediately to deposit the caution-money, amounting to 8000*l.*, into the hands of the governor of the canton of Neuchâtel.

"Art. 3. The works are to be executed in conformity with the plans of Mr. Weltz, &c.

"Art. 4. Messrs. Besnard and Beslay will furnish 280,000*l.* in money, of which three-fourths, or 210,000*l.*, against shares, and one-fourth, or 70,000*l.*, against debentures. Besides the shares and debentures repre-
*595] senting the above capital of 280,000*l.*, they shall receive *90,000*l.* in free shares, as concessionaires, to cover the premium necessary to raise the said capital of 280,000*l.*, and as a remuneration for their previous expense and trouble, and for giving up their share of the profits which they might have made in constructing the line.

"Art. 5. It is admitted (reconnu) by all parties that 35,600*l.* in free shares is to be allotted (attribué) to M. le Comte Pourtales Gorgier for the care and trouble he has had up to this day, and which he might yet have to take up to the complete organization of the company.

"Art. 6. There shall be issued 640,000*l.* in shares, and 160,000*l.* in

debentures, for making the above railway and branches. This capital will be in conformity with the preceding articles, and be apportioned in the following manner,—first, to Messrs. Morris, Merrett, and Lelievre, 662,400*l.*,—secondly, Messrs. Besnard and Beslay, 90,000*l.*,—thirdly, M. le Comte Pourtales Gorgier, 35,600*l.*,—fourthly, the credit of the company for expenses of administration, &c., 12,000*l.*,—total, 800,000*l.* On the capital, to be raised by shares of 500 francs, the first call will be of 1*l.* on the 1st of February next; the remainder in conformity with the statutes which shall be drawn up with common accord.

"Art. 7. The company will be managed by ten directors at the most, of whom five are to be named by Messrs. Morris, Merrett, and Lelievre, and five are to be named by Messrs. Beslay & Co. M. le Comte Pourtales is requested from this time to become the chairman of the board, which he agrees to.

"Art. 8. It is understood that the bridges of Lorquier and De la Reus shall be constructed of iron, if the expense do not exceed the estimate. It is understood that, if the company should make embellishments, or any changes in the plans other than those absolutely *required, the increased expense shall be borne by the company. [*596

"Art. 9. In case that, on or before the 1st of February next, or, at the latest, within the month after the confirmation by the federal council of the act of concession, Messrs. Besnard and Beslay shall not have paid to the bankers of the company the 1*l.* agreed to on each of the 10,500 shares for which they are to provide the funds, they shall be deprived ipso facto of all rights whatsoever to the concession and to the 90,000*l.* in free shares mentioned in Art. 4. It is understood that Messrs. Morris and their colleagues shall have within the same date, under a like penalty, either in money, or caution-money, or the value of works effected, the payment of 1*l.* on each of the 3050 shares of which they are to provide the funds.

"Art. 10. Sir William Cubitt, civil engineer at London, shall be named consulting engineer of the company.

"Art. 11. All disagreements or difficulties relative to the carrying out of these presents shall be submitted, in the last resort, to two referees respectively named by the parties; and, in case of disagreement, to the decision of an umpire to be named by the president of the Tribunal of Commerce of the Seine."

Before the execution of this last agreement, the plaintiff, being for that purpose authorized by the defendant, was instrumental in obtaining a concession for making the railway being granted to the defendant in conjunction with Messrs. Besnard, Beslay, Merrett, and Lelievre. This concession was on the 29th of November, 1853, provisionally, and on the 16th December, 1853, finally, ratified by the Grand Council of Neuchâtel.

After the execution of the agreement of the 19th of December, 1853, the plaintiff at his own cost prepared *the statutes or articles of settlement of the company which was to be formed according to the agreement. [*597

In May, 1855, the defendant assigned all his interest in the concession to Messrs. Leuba & Co., and that assignment was duly recognised by the Federal Council of the canton: and, in consequence of that

assignment, and of disputes which had arisen between the different concessionaires, the company proposed to be formed by the agreement of the 19th of December, 1853, was not formed, and consequently the defendant was never in a condition to give the plaintiff the 35,600*l.* in free shares.

The learned judge ruled that the agreement produced did not support the declaration, inasmuch as it was not a personal engagement by the defendant to pay the plaintiff 35,600*l.*, or to give him free shares to that amount: and he thereupon directed a nonsuit to be entered, but reserved to the plaintiff leave to make any amendment which the court might think fit.

Lush, Q. C., in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground that there was evidence for the jury of a contract upon which the plaintiff was entitled to recover, inasmuch as the defendant had wrongfully put it out of his power to perform the contract.

M. Smith, Q. C., *T. Jones*, and *Milward*, showed cause, submitting that there was no agreement personally binding the defendant to give the plaintiff the stipulated number of shares, the company never having been formed; and that, if there had been any such promise, it was without consideration.

Lush, Q. C., and *Holl*, in support of the rule, insisted that there was
*598] ample evidence of a binding contract, *which but for the wrongful act of the defendant and his partners might have been carried out. *Cur. adv. vult.*

WILLIAMS, J., now delivered the judgment of the court.

In this case, when the position of the parties is closely considered, it becomes obvious that the provision relied upon by the plaintiff as a binding contract to give him the specified number of shares, was in truth only an arrangement of the amount of the present which the promoters were willing to award to him.

There was no consideration for a binding promise on their part to give him the shares. The past services of the plaintiff were not rendered for any payment or allotment of shares stipulated to be made in the event which has happened, of a joint concession to the defendant and his rivals. And, as for the anticipated future services of the plaintiff, the mere expectation of them was not a valid consideration, and he did not contract, and was not under any obligation, to render any.

There was, therefore, no contract with the plaintiff binding in point of law upon the defendant, and the nonsuit was right.

Rule discharged.

*DOE d. GUTTERIDGE *v.* SOWERBY. [*599

An admittance (previous to the 4 & 5 Vict. c. 35) by the steward of a manor, as such, out of the manor, whether at a court or otherwise, was bad. But, as such an admittance would have been good if a special authority for that purpose had been given by the lord, so also it might have been rendered valid by his subsequent ratification and notification to the homage, so as to make it an admittance by implication.

A. was in 1810 admitted, out of court, by the steward, to a copyhold, upon a surrender made in 1791, and paid a fine to the steward for the use of the lord. An informal entry of the admittance appeared on the court rolls; and the admittance was in subsequent entries treated as a valid admittance, and the property had been held for about thirty-five years, under it, and transmitted to purchasers:—Held, upon a special case, upon which the court were to draw inferences as a jury, that the admittance, though at first invalid, was rendered a good admittance by the subsequent ratification and adoption of the lord.

THIS was an action of ejectment brought on the 31st of July, 1845, to recover an undivided moiety of certain copyhold premises, situate in and being parcel of the manor of Cockernhoe, in the parish of Offley, and county of Hertford, being the undivided moiety of which Mary Gutteridge was admitted tenant on the 27th of December, 1781, as hereinafter set out.

The declaration, which was dated the 31st of July, 1845, was served in August, 1845; and the cause came on to be tried before Lord Denman, C. J., at the Hertford Spring Assizes, 1848, when a verdict was found for the defendant, subject to the opinion of the court upon the following case:—

On the 27th of December, 1781, Mary Gutteridge, then being the wife of James Gutteridge, was, *out of court, and out of the manor*, admitted by the then lady of the manor alone, as devisee under the will of her father, William Rudd (then deceased), to the undivided moiety of certain copyhold premises held of the manor of Cockernhoe aforesaid, as tenant in common in fee, her sister Elizabeth (also a daughter of William Rudd), then the wife of Daniel Rudd, being admitted on the same day to the other moiety. The following is a copy of the entry on the court-rolls of the manor:—

"The manor of Cockernhoe, in the county of Hertford. } Whereas, William Rudd, late of Wandon End, in the parish of King's Walden, in the county of Hertford, gentleman, a customary tenant of the said manor, in his lifetime held to him and his heirs of the lady of the said manor,—

*"All that close of land called Cockernhoe Hall, containing all those 6 acres of land more there to the said close belonging, by copy of court-roll, fealty, suit of court, and the yearly rent of 6*s.* 8*d.*; and also all that other close of land called Brocker Croft, containing by estimation 10 acres; and also all those 9 acres of land lying in a certain place called Dane Croft: and also all those 5 acres of land lying in a certain place called Laybread, and all those 10 acres of land lying in Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid, by copy of court-roll, fealty, suit of court, and the yearly rent of 20*s.*: and also all that rood of land called Gibb's Half-Acre, lying within the manor aforesaid, by copy of court-roll, fealty, suit, and the yearly rent of 3*d.*; and also all those three crofts of land with a pightle called Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid; and all those 5 acres of land lying in the above [*600

place called Laybread, within the manor aforesaid, by copy of court-roll, fealty, suit of court, and the yearly rent of 21*s.* 8*d.*; and also certain lands and tenements, with the appurtenances, within the manor aforesaid, formerly the lands and tenements of Jeremy Godfrey, deceased, by copy of court-roll, fealty, suit of court, and the yearly rent of 8*s.* 6*d.*; and also all that piece of land lying in a certain place called Handicroft, within the manor aforesaid, containing by estimation 30 poles, more or less, lying between the lands formerly of Richard Brigg and the land some time of Richard Pilgrim, and abutting northwards upon a certain place called Pasture Close, and southward upon Brickpond Close, heretofore the land of one John Pilgrim, by copy of court-roll, fealty, suit of court, and the yearly rent of 4*d.*; and also one rood of land divided by a hedge from the
*601] northwest part of *a close formerly of Thomas Rudd, called Pidsdenhill, otherwise Pillsdenhill, by copy of court-roll, fealty, suit of court, and the yearly rent of 1*d.*

"To which said several premises the said William Rudd was admitted tenant at a general court-baron held for the said manor on the 30th day of September, which was in the year of Our Lord 1762, upon the surrender of Henry Field, gentleman. That the said William Rudd died thereof seised, having first surrendered the same to the use of his last will and testament, as appears by the rolls of the same court; and that the said William Rudd is departed this life, having first duly made and published his last will and testament in writing, bearing date the 29th day of May, 1780, whereby he gave and devised unto his two daughters, Mary, the wife of James Gutteridge, and Elizabeth, wife of Daniel Rudd, being the Mary and Elizabeth above named,—

"All that his messuage or farmhouse situate at Cockernhoe, in the parish of Offley, in the said county of Hertford, with the barns, stables, outhouses, and appurtenances thereto belonging, with all and singular the lands and grounds thereto belonging, in the said will more particularly mentioned.

"To hold the said premises unto the said two daughters, Mary Gutteridge and Elizabeth Rudd, and to their heirs and assigns for ever, as tenants in common, and not as joint tenants, chargeable as in the said will is mentioned.

"Now be it remembered, that, on the 27th day of December, 1781, came before the Honorable Dame Sarah Salusbury, widow, the lady of the said manor, at her capital mansion-house called Offley Place, in the parish of Offley aforesaid, the said Mary, the wife of the said James Gutteridge, and then, in the presence of William Wilshire the younger, gentleman, deputy steward of William Richard Tristram, gentleman,
*602] capital steward *of the said manor, humbly desired of the said lady of the said manor to be out of court admitted tenant to one undivided moiety (the whole into two equal parts to be divided) of and in all the said pieces or parcels of land and premises, with the appurtenances: And thereupon the said lady of the said manor, at her humble request, by her own hands, out of her special grace and favour, out of court, in the presence of the said deputy steward, did grant and deliver seisin thereof by the rod to the said Mary the wife of the said James Gutteridge, according to the custom of the said manor, to have and to hold the said moiety of the said pieces or parcels of land and premises,

with the appurtenances, unto the said Mary, the wife of the said James Gutteridge, her heirs and assigns for ever, by the rod, at the will of the lady, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, the yearly rents aforesaid, and other duties, customs, and services therefor due and of right accustomed: And she gives to the lady for a fine for such her estate and entry in the premises aforesaid as appears in the margin: her fealty is respited; and so, saving always the right of the lady, the said Mary, wife of the said James Gutteridge, is admitted thereof tenant in form aforesaid.

"S. SALUSBURY, Lady of the said manor."

"This admission was granted in the presence of

"WILLIAM WILSHIRE, jun., deputy steward."

The premises of which a moiety was included in this admission were the same as those of which the said William Rudd died seised, and which he devised to his said daughters, as stated in the said court-rolls; and under this admission the said Mary Gutteridge is alleged to have become and been seised of such moiety in fee, at the will of the lady, according to the custom of the said manor, as expressed in the said admission.

*On the 19th of November, 1782, the said James Gutteridge and Mary his wife (the latter having been first solely and separately examined) did out of court surrender the said undivided moiety to the use of the said Mary for life, with remainder to the use of the said James Gutteridge, her husband, for life, with remainder to the use of the heirs and assigns of the said Mary Gutteridge for ever. [*603

Between the year 1782 and 1787, several general courts-baron were held in and for the said manor, at which nothing was done; and no presentment was made touching the premises in question.

On the 10th of March, 1787, at a special court-baron of the said manor, the said surrender was presented by the homage; and the said Mary Gutteridge was admitted, and enjoyed the said moiety in pursuance thereof. The following is the entry of the presentment and admittance on the court-rolls.

"The Manor of Cockernhoe, in the county of Hertford, 10 March, 1787. } The special court-baron of the Honourable Dame Sarah Salusbury, widow, lady of the said manor, holden in and for the manor aforesaid, on Saturday, the 10th day of March, 1787, and in the 27th year of the reign of Our Sovereign Lord George the Third, &c., before Lawrence Times, gentleman, steward there.

"The homage there

"MATTHEW ROBINSON, } sworn.
"JOHN JOYNER, }

"Also at this court the homage aforesaid upon their oath present, that, since the last general court-baron held for the said manor, that is to say, on the 19th day of November, 1782, James Gutteridge, of Cockernhoe, in the parish of Offley, in the county of Hertford, yeoman, and Mary his wife, one of the two daughters and a devisee named in the last will and testament of *William Rudd, late of Wandon End, in the parish of King's Walden, in the said county of Hertford, gentleman, deceased, late a customary tenant of the said manor, the said Mary being also a customary tenant of the said manor, and being first [*604

solely and separately examined apart from her said husband by Richard Tristram, gentleman, steward of the said manor, and consenting thereto, did out of court surrender into the hands of the lady of the said manor, by the rod, according to the custom thereof, by the hands and acceptance of the said steward.

"All that undivided moiety or half part, the whole into two equal parts to be divided, of and in all that close of land called Cockernhoe Hall, within the manor aforesaid, containing by estimation 3 acres, more or less; and also of and in all those 6 acres of land more there to the said close belonging; and also of and in all that other close of land called Brock Croft, containing by estimation 10 acres; and also of and in all those 9 acres of land lying in a certain place called Dan Croft; and also of and in all those 5 acres of land lying in a certain place called Laybread; and also of and in all those 10 acres of land lying in Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid; and also of and in all that rood of land called Gibb's Half-Acre, lying within the manor aforesaid; and also of and in all those 3 crofts of land, with a pightle, called Pidsdenhill, otherwise Pillsdenhill, within the manor aforesaid; and also of and in all those 5 acres of land lying in the above said place called Laybread, within the manor aforesaid; and also of and in certain lands and tenements, with the appurtenances, within the manor aforesaid, formerly the lands and tenements of Jeremy Godfrey, deceased; and also of and
*605] in all that piece of land lying in a *certain place called Handi-croft, within the manor aforesaid, containing by estimation 30 poles, more or less, lying between the lands formerly of Richard Bigg and the land sometime of Richard Pilgrim, and abutting northward upon a certain piece called Pasture close, and southward upon Brick-pond close, heretofore the land of one John Pilgrim; and also of and in one rood of land divided by a hedge from the north-west part of a close formerly of Thomas Rudd, called Pidsdenhill, otherwise Pillsdenhill,—

"To which said moiety of the said several premises the said Mary, the wife of the said James Gutteridge, was admitted tenant by the lady of the said manor, out of court, on the 27th day of December then last past, under the surrender and will of the said William Rudd;

"And also all other the copyhold or customary messuages, cottages, lands, tenements, and hereditaments, and parts and shares of customary or copyhold messuages, lands, tenements, and hereditaments, whatsoever, holden of the said manor, which were by the will of the said William Rudd devised to the said Mary, the wife of the said James Gutteridge, with their and every of their appurtenances, and of and in all hedges, ditches, trees, fences, commons, ways, waters, watercourses, easements, paths, passages, profits, commodities, hereditaments, and appurtenances whatsoever to the said several closes, pieces, and parcels of land, hereditaments, and premises belonging, used, or in any wise appertaining; and the reversion and reversions, remainder and remainders thereof,

"To the use and behoof of the said Mary, the wife of the said James Gutteridge, and her assigns, for and during the term of her natural life; and, from and after her decease, To the use and behoof the said

*James Gutteridge and his assigns for and during the term of his natural life; and, from and immediately after the several [*606 deceases of the said James Gutteridge and Mary his wife, and the decease of the survivor of them, then To the use and behoof of the heirs and assigns of the said Mary Gutteridge for ever, according to the custom of the said manor:

"Now, at this court, in her proper person, comes the said Mary Gutteridge, and humbly desires of the lady of the said manor to be admitted tenant to the said undivided moiety or half part of the said pieces or parcels of the said lands and premises so surrendered as aforesaid; To whom the lady of the said manor, by her said steward, granteth seisin thereof by the rod, To have and to hold the said undivided moiety or half part of all the said pieces or parcels of land and premises, with the appurtenances, unto the said Mary Gutteridge and her assigns for and during the term of her natural life, with such remainders over as in the said surrender are mentioned, of the lady of the said manor, by the rod, at the will of the lady, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, customary heriots, when they happen, the yearly rents and other duties, customs, and services therefor due and of right accustomed; but she doth not give anything to the lady for a fine for such her estate and entry in the premises aforesaid, because the same was paid upon her former admission: her fealty is respited; and so, saving always the right of the lady, the said Mary Gutteridge is admitted thereto tenant in form aforesaid.

"The end of this court."

Between the making of the preceding surrender of the 19th of November, 1782, and its presentment on the 10th of March, 1787, two general courts-baron were in fact holden for the said manor, viz., one on the *4th of January, 1786, and another on the 27th of September, 1786: and entries of the proceedings of those courts [*607 were duly made upon the rolls of the manor, but at neither of those courts, nor at any time before the 10th of March, 1787, was the surrender of the 19th of November, 1782, presented or entered, or noted or mentioned upon the rolls of the manor.

On the 17th of September, 1791, the said James Gutteridge and Mary his wife,—the latter having been first solely and separately examined,—did out of court surrender, by the hands and acceptance of the steward of the said manor, the said undivided moiety to which the said Mary had been so admitted in 1781 as aforesaid to the use of the said Mary Gutteridge for the joint lives of herself and her husband; and, after her decease, in case he should survive her, To the use of the said James Gutteridge her husband for his life, with remainder to such uses as James Gutteridge should by will appoint; with remainder to the use of the heirs and assigns of the said James Gutteridge for ever.

The said Mary Gutteridge died in the year 1796 without having been admitted on the preceding surrender; and such surrender was never presented at any court of the manor.

Between the date of the last-mentioned surrender and the 10th of May, 1810, there were three special courts held for the said manor,—in 1797, 1802, and 1808, respectively,—at which presentments, surrenders, and admittances of copyholds took place; the two first courts relating each to one single transaction, and the third to three trans-

actions; but no general court till after the 19th of May, 1810. Entries of such special courts appear upon the rolls of the manor, but they are not, and do not purport ever to have been, signed by the steward for the time being.

*608] In order to prove the admittance of the said James *Gutteridge on the said surrender of 17th September, 1791, and its entry on the rolls of the manor, the defendant at the trial put in evidence a book produced by John Hawkins, the then steward of the manor, as the book containing the court-rolls of the manor, in which was the following entry:—

"The Manor of Cockernhoe, in the county of Hertford. 19th May, 1810. } Be it remembered, that, on the 19th day of May, 1810, at the house of William Wilshire, Esq., the steward of the said manor, in Hitchin, in the county of Hertford, before the said William Wilshire cometh James Gutteridge, &c. [This entry relates to the other moiety, which is not in question in this cause]:

"And be it also remembered, that, on the 19th day of May, 1810, at the place aforesaid, the said James Gutteridge cometh before the said steward, and produceth to him a surrender made by the said James Gutteridge and by Mary his wife, of the tenor or to the effect following, that is to say,—'The manor of Cockernhoe, in the county of Hertford. Be it remembered, that, on the 17th day of September, 1791, James Gutteridge, of Cockernhoe, in the parish of Offley, in the county of Hertford, yeoman, and Mary his wife, customary tenants of the said manor, in their proper persons came before William Wilshire the younger, gentleman, steward of the said manor, and,—she the said Mary being first solely and separately examined apart from her said husband, and consenting,—did out of court surrender unto the hands of the lady of the manor, by the rod, by the hands and acceptance of the said steward,—

"'One undivided moiety or half-part, &c.,' [describing the premises.]

*609] "'To which moiety the said Mary, the wife of the said James Gutteridge, was admitted tenant to her and *her heirs, out of court, by the hands of the lady of the said manor, on the 27th day of December, 1781, under the surrender and will of William Rudd, her late father, deceased, and at a court-baron holden for the said manor on the 10th day of March, 1787, was admitted for her life, with remainder to the said James Gutteridge for his life, with remainder to the heirs and assigns of the said Mary, under a surrender thereof made to those uses by the said James Gutteridge and Mary his wife.

"'And of and in all other the copyhold lands and hereditaments late of the said William Rudd; and of and in all hedges, ditches, trees, fences, common ways, waters, easements, profits, commodities, and appurtenances, to the said closes, pieces and parcels of land and premises belonging, or in anywise appertaining; and the reversion, &c.; and all the estate, &c.

"'To the use and behoof of the said Mary Gutteridge during the joint lives of the said Mary Gutteridge and of the said James Gutteridge her husband; and, from and after the decease of the said Mary Gutteridge, in case the said James Gutteridge shall survive her, to the

use of the said James Gutteridge for and during the term of his natural life; and, from and immediately after the decease of the said James Gutteridge, to the use of such person and persons, and for such estate and estates, intents, and purposes, and with and subject to such charges, powers, provisoes, restrictions, and limitations, as the said James Gutteridge shall in and by his last will and testament in writing, or any writing purporting to be or being in the nature of his last will and testament, give, devise, direct, or appoint the same moiety, or any part thereof; and, for default of such gift, devise, direction, or appointment, to the use of the heirs and assigns of the said James *Gutteridge [*610 for ever, according to the custom of the said manor.

"'JAMES GUTTERIDGE. MARY GUTTERIDGE.

"'Taken the day and year first above written, by me, William Wilshire, jun., steward.'

"And the said James Gutteridge further informeth the said steward that the said Mary Gutteridge his wife hath since the making of the said surrender departed this life.

"And the said James Gutteridge now prayeth of the lord of the said manor to be admitted tenant of the said moiety and hereditaments; to whom the lord of the said manor doth by his said steward, out of court, grant seisin thereof by the rod, to have and to hold the said moiety, with the appurtenances, unto the said James Gutteridge, with such remainder as in the said surrender, of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, the yearly rents and other duties, customs, and services therefor due and of right accustomed. And he giveth to the lord for fines for such his estate and entry in the premises as appears in the margin: his fealty is respited; and so, saving always the right of the lord, the said James Gutteridge is admitted thereof tenant in form aforesaid."

This entry was read subject to objections on the part of the lessor of the plaintiff.

The house of the said William Wilshire, in Hitchin, mentioned in the said entry, is and always was situate out of the said manor of Cockernhoe.

On this admission, or supposed admission, James Gutteridge, in respect of the said moiety in question in this cause, paid to the steward of the manor, for the use of the lord, a fine of 65*l.*; and afterwards, in respect of the same moiety, paid to the steward for the *use of [*611 the lord, annually, the quit-rents due for the same, amounting to between 3*l.* and 4*l.* a year.

On the 4th of February, 1820, James Gutteridge surrendered the said premises to William Oakley in fee. To prove the admission of William Oakley on such surrender, the defendant read in evidence (subject to objections on the part of the lessor of the plaintiff) the following entry in the book produced by John Hawkins, then steward of the manor:—

"The manor of Cockernhoe, in the county of Hertford. 19th May, 1826. } The general court-baron of Richard Oakley, Esq., lord of the said manor, holden in and for the manor aforesaid on Friday the 19th day of May, 1826, and in the 7th year of the reign of Our Sovereign Lord George the Fourth, &c., before John Hawkins,

gentleman, deputy steward of Joseph Eade, gentleman, steward of the said manor.

"The homage { WILLIAM OAKLEY, WILLIAM MARLOW, JOSEPH JOYNER, } sworn.

"At this court, the homage aforesaid upon their oath present, that, on the 4th of February, 1820, James Gutteridge, of, &c., one of the customary tenants of the said manor, for and in consideration of the sum of 4500*l.* of lawful British money to him upon or before the making of the said surrender in hand paid by William Oakley, the surrenderee thereinafter named, in full for the absolute purchase of the closes, lands, grounds, and hereditaments thereinafter mentioned and described, with their appurtenances, the receipt whereof is by the surrender acknowledged, did out of court surrender by the rod into the hands of the lord of the said manor, by the hands and acceptance of John Hawkins, gentleman, deputy steward of Joseph Eade, gentleman, chief steward of the said manor, according to the custom thereof.

*612] *"Of which moiety the said James Gutteridge was admitted tenant to him and his heirs on the 19th day of May, 1810, on the surrender of Daniel Rudd and Elizabeth his wife;

"And also all that other undivided moiety or half part of and in the same lands.

"Of which the said James Gutteridge was admitted tenant to him and his heirs on the said 19th day of May, 1810, on the surrender of himself and Mary his wife;

"And also all those 44½ acres of land and ground parcel of 48½ acres holden of the said manor, formerly the estate of Valentine Rudd, deceased, and which were described many years since in the court-rolls of the said manor as 10 acres of land lying together in Pidesden Hill, 16 acres in Laybread, 13 acres in Dane Croft, 5 acres lying together in Long Croft, east of Brick Croft, and 2 roods in Thurley, 4 acres, residue of the said 48½ acres, being called Laycroft, and lying at the west corner of Little Reddings; And also one parcel of land to the same adjoining, containing 6 poles in length and 6 poles in breadth, more or less, lying and being in the parish of Offley aforesaid,—

"Of which last-mentioned premises the said James Gutteridge was admitted tenant on the 6th day of January last, on the surrender of William Rudd;

"And also so much and such part of certain closes called Long Close and Hilder's Croft, otherwise Middle Close, as is copyhold, containing about 6 acres:—

"To which the said James Gutteridge was also admitted tenant on the 26th day of January last:

"All which said copyhold closes, lands, grounds, hereditaments, and premises hereinbefore described, contain together by admeasurement 102*a.* 3*r.* 28*p.*, and were then or then late were in the occupation

*613] *of the said James Gutteridge, and were then called by the several names and contained the several quantities next hereinafter contained and expressed, that is to say, Dane Croft containing 9 acres, the copyhold part of Long Close and Middle Close contain-

ing 6 acres, Great Brick Croft Spring containing 5*a.* 2*r.*, Brick Croft containing 4*a.* 0*r.* 38*p.*, the Brick Kiln Enclosure, formerly called Cockernhoe Hall Close, containing 2*a.* 1*r.* 34*p.*, the Spring adjoining Cockernhoe Hall Close containing 3*r.* 14*p.*, Laybread Close containing 10*a.* 1*r.* 6*p.*, the Spring adjoining Laybread Close containing 1*r.* 14*p.*, Upper Pigeon Hill containing 13*a.* 2*r.* 8*p.*, Lower Pigeon Hill containing 9*a.* 1*r.* 30*p.*, Puddock Tails containing 3*r.* 35*p.*, Brick Pond Close containing 11*a.* 1*r.* 27*p.*, Twelve Acres Close containing 9*a.* 3*r.* 24*p.*, Ten Acres Close containing 10*a.* 0*r.* 35*p.*, and Eight Acres Close containing 8*a.* 3*r.* 3*p.*; And also all those two cottages or tenements, with the gardens thereto belonging and adjoining, situate, standing, and being on part of Brick Pond Close, hereinbefore described, and then or then late in the occupation of Joseph Lawrence and Benjamin Botsworth; And also all those two other cottages or tenements, with the gardens adjoining and belonging, ituate and standing on part of Eight Acres Close, hereinbefore described, and then or then late in the occupation of Robert Hawkes and John Nash, together with all hedges, dicthes, trees, mounds, fences, ways, paths, passages, waters, watercourses, profits, privileges, hereditaments, and appurtenances whatsoever to the said closes, lands, grounds, and premises belonging or appertaining; and the reversion, &c., and all the estate, &c., of him the said James Gutteridge of, in, and to the said premises and every part thereof.

*" To the use of William Oakley, of Wandon End, in the parish of King's Walden, in the county of Hertford, gentleman, his [*614 heirs and assigns for ever, absolutely, according to the custom of the said manor:

"Now at this court in his proper person cometh the said William Oakley, and humbly prayeth of the lord of the said manor to be admitted tenant of the said moieties, pieces, or parcels of land and hereditaments, with the appurtenances so surrendered to his use as aforesaid; to whom the lord of the said manor by his said deputy steward granteth seisin thereof by the rod, To have and to hold the said moieties, pieces, or parcels of land and hereditaments, with the appurtenances, unto the said William Oakley, his heirs and assigns, of the lord of the said manor, by the rod, at the will of the lord, according to the custom of the said manor, by copy of court-roll, fealty, suit of court, the yearly rent aforesaid, and the duties, customs, and services therefor due and of right accustomed: And he giveth to the lord for fines for such his estate and entry in the premises as appears in the margin: his fealty is respited; and so, saving always the right of the lord, the said William Oakley is admitted thereof tenant in form aforesaid."

The said William Oakley upon his admission, or supposed admission, above mentioned, paid to the lord of the said manor, who received from him, a fine of 225*l.* in respect of such admission. He died in 1834; and by his will, dated the 6th of March, 1832, he devised all the said premises in the last-mentioned entry to Richard Oakley the younger, in fee, who was admitted thereto on the 30th of October, 1837, at a general court-baron holden in and for the said manor.

In 1839, Richard Oakley the elder, who was lord of the manor, died, having by his will, dated the 15th of January, 1835, devised the same

*615] manor to the said *Richard Oakley the younger, in fee, who thereupon became lord of the said manor. And, in 1843, the said Richard Oakley the younger bargained and sold, released and conveyed the said manor, with the said last-mentioned premises, to the defendant, who then became, and from thence hitherto has been, lord of the said manor.

James Gutteridge, in the said several entries named, died in 1830. He was the husband of the said Mary Gutteridge, and the grandfather of the lessor of the plaintiff. He was not in possession at the time of his death, nor was he so for about ten years before that event.

Neither the above-mentioned entries in the book produced by the steward, nor the entries of the special courts held between 1791 and 1810, appeared to be signed by the steward of the manor for the then time being: and this was the case with respect to many other entries of courts holden for the said manor both before and since the year 1791; but they were proved by John Hawkins, the present steward, who produced them, to have been in the handwriting of a clerk of the steward for the then time being.

It appears by the rolls of the said manor, that, up to the last court holden for the said manor in 1812, Wilshire was steward of the manor, and that Eade had sometimes acted as his deputy steward of the manor; that the next court was held in 1814, when Eade had become steward; and that John Hawkins, the present steward, acted as his deputy steward of the manor. Hawkins was also Eade's partner in business. Eade held the office till his death in 1828, and was succeeded by Hawkins, who has been steward ever since.

The above entry of the admission of 1810 is in the handwriting of a *616] person who was at the time it *purported to have been made, and until Wilshire ceased to be steward, a clerk of Wilshire. When Hawkins found a draft of the entry of the admission of 1810 in Wilshire's own handwriting, he thereupon compared the said entry on the rolls with the said draft in Wilshire's own handwriting, and, having found them to correspond, he then signed his name "John Hawkins" beneath the said entry, and so perfected the same as it now appears. This draft was not produced.

When Hawkins became steward in December, 1828, none of the courts or other entries on the court-rolls of the manor since 1787,—except one in 1814, signed by Eade, the then steward,—were signed at all: they amount in number to eleven. Hawkins found the drafts of the same courts and entries in Wilshire's own handwriting; and, having compared and found them to correspond with the courts and entries on the said court-rolls, he then, as and being such steward, signed his name "John Hawkins" beneath each of the said courts and entries, and so perfected the same as they now appear.

The court of the 19th of May, 1826, was held by Hawkins as deputy steward of the said manor.

Subsequently to the 17th of September, 1791, and before the 19th of May, 1810, the following and no other courts-baron were held in and for the said manor, as appears by the said books, viz.:—

On the 18th of November, 1797, a special court-baron of the Hon. Dame Sarah Salusbury, widow, the then lady of the manor, was held before William Wilshire the younger, steward of the said manor; James

Gutteridge and William Rudd being the homage: it relates only to one transaction, and was not signed by anybody, but concludes with the words "Examined by."

On the 17th of April, 1802, there was a special *court-baron of the said manor, which related to only one transaction; and on [*617 the 12th of April, 1803, there was a third special court relative to three transactions: they were held before the said William Wilshire, the steward of the manor; but neither of them was signed by Wilshire, but by John Hawkins in 1828, as above mentioned.

On the 4th of December, 1812, the 10th of June, 1814, and on the 21st of January, 1820, general courts-baron of the said manor were held, as follows,—the court on the 4th of December, 1812, before the said William Wilshire as steward of the manor, not signed by him or anybody in his lifetime, but by John Hawkins, in 1828, as aforesaid.

The court on the 10th of June, 1814, before Joseph Eade as steward of the manor, and which was duly signed by him; and the court on the 21st of January, 1820, before John Hawkins, as deputy steward of J. Eade, steward of the manor.

There is not any special custom of the said manor relating to the presentment of a surrender at the next court, or in court.

There are three instances in the year 1781, one in the year 1805, and three in the year 1810, of admittances by the steward on surrenders never presented at any court. There are two surrenders made in 1791, presented at a court in 1812, and admittances taken on them accordingly.

No notice is given of the intention to hold a special court of the manor; and no business is transacted at a special court, except the special business for which the court is held. But public notice is given of the general courts-baron.

As well the surrender of the 19th of November, 1782, as that of the 17th of September, 1791, were without pecuniary consideration.

*The surrender by James Gutteridge to William Oakley, and [*618 the conveyances by his nephew Richard Oakley to the defendant, were both made for pecuniary considerations.

James Gutteridge, the father of the lessor of the plaintiff, was the eldest son of the said James Gutteridge and the said Mary his wife, and heir-at-law and customary heir of the said Mary Gutteridge, and was born in 1783, and died in August, 1822.

The lessor of the plaintiff was the eldest son of the said James Gutteridge the son and Sarah his wife, and was born in 1811. He was and is the heir-at-law and customary heir, as well of the said James Gutteridge the son, as of the said Mary Gutteridge, and also of the said James Gutteridge the grandfather.

The lessor of the plaintiff, before bringing this action, applied to the defendant, as lord of the said manor, to be admitted on the roll as tenant to the moiety of the said premises for which this action was brought, but was refused admission.(*a*)

There is not by the custom of the said manor any tenancy by the courtesy.

(*a*) This paragraph was struck out by the defendant's counsel, but ordered to be restored on the 14th of April, 1859, by Justice Byles, in chambers, to whom the case was referred to be settled.

It was agreed that the pleadings in the action should form part of the special case, and that the court-rolls of the manor and the before-mentioned books, surrenders, admissions, and documents should be referred to and inspected by the court and counsel on the argument. It was also agreed that the court might draw any inference from the facts stated which a jury would be warranted in doing.

The question for the opinion of the court was,—whether, on the facts *619] and evidence above stated, giving *such effect to the objections above mentioned as was due to them, the lessor of the plaintiff was entitled to recover in this action the said moiety of the said copyhold estate to which the said Mary Gutteridge was, as alleged, entitled in fee under the said admission of the 27th of December, 1781.

If the court should be of opinion that he was so entitled to recover, then the verdict was to be entered for the plaintiff for 1*s.* damages, and 40*s.* costs: but, if the court should be of a contrary opinion, then the verdict was to be entered for the defendant.

H. James, for the plaintiff.—The admittance of Mary Gutteridge, in 1787, upon the surrender of 1782, was valid, notwithstanding the lapse of time. As a general rule, no doubt, prior to the statute 4 & 5 Vict. c. 35, a presentment at the first court held after the surrender was necessary: see Co. Litt. 62 a, where it is said,—"By the surrender out of court, the copyhold estate passeth to the lord under a secret condition that it be presented at the next court according to the custom of the manor: and, therefore, if after such a surrender, and before the next court, he that made the surrender dieth, yet the surrender standeth good; and if it be presented at the next court, ce' qui use shall be admitted thereunto; but, if it be not presented at the next court according to the custom, then the surrender becometh void; and so it was clearly holden, Pasch. 14 Eliz. in the Common Pleas, which I myself heard." So, in Gilbert on Tenures, p. 280, it is said, "Presentment, by the general custom of manors, ought to be made at the next court day." But it is for the lord to object to the want of a presentment; and he may waive it. Gilbert says, p. 278, "It seems that the presentment of a surrender in court is only by way of instruction, to let *620] the lord know of the surrender, and *accordingly he may admit; for, it is apparent that a presentment is not of necessity, because the lord may admit out of court; and any act of the lord's consenting to the surrender will amount to an admittance, which plainly shows that a presentment is only to show there was such a surrender; for, if it were of necessity, then there could be no admittance out of court, nor no act implying the lord's consent would be tantamount to an admittance; and then, if we go to the reason of the thing, since the estate is only to be surrendered to the lord, and by him transferred to the surrenderee, if he accept the surrender, and grant an admittance, which is all that can be done, what need is there of a presentment? and of what use can it be for the homage to present a surrender, in order for the lord's admittance, when the lord may take notice that there was such a surrender, accept it, and admit accordingly?" There may be a special custom for the lord to waive a presentment at the next court: and on the face of this case it seems that several admittances appear upon the court-rolls without any previous presentment of surrenders; and some where the surrender has preceded the admittance by several years,—as

in the case of James Gutteridge, who appears to have been admitted in 1810, upon a surrender made in 1791. In Doe d. Mason *v.* Mason, 8 Wils. 63, a single admittance to a copyhold was held sufficient to prove the custom of a manor for lands to descend to the youngest nephew. So, in Roe d. Bennett *v.* Jeffery, 2 M. & Selw. 92, a single instance of a surrender in fee by tenant in special tail of a copyhold estate, was held to be evidence to prove a custom within the manor to bar entails by surrender, though the surrenderor had not been dead twenty years, and though one instance was proved of a recovery suffered by tenant in tail to bar the entail. [WILLIAMS, J.—You must go to the length *of saying that a copyhold estate may pass without any surrender at all.] Without presentment. [WILLIAMS, J.—In Doe d. Priestley *v.* Calloway, 6 B. & C. 484, 493 (E. C. L. R. vol. 10), 9 D. & R. 518, 526 (E. C. L. R. vol. 22), Lord Tenterden seems to doubt whether a custom to present a surrender at any subsequent court would be a valid custom.] The law upon the subject is to be found in 1 Scriven on Copyhold, 4th edit. 223, 224, where the case of Doe d. Priestley *v.* Calloway is referred to. [*621

Then, the admittance of James Gutteridge in 1810, upon the surrender of 1791, was void. The admittance was made by the steward at his own residence, which was out of the manor. Though it may be competent to the lord so to admit, it clearly is not competent to the steward to admit otherwise than at a court held within the manor. In Melwich *v.* Luter, 4 Co. Rep. 26 a, "it was resolved (4th resolution) that the lord himself may make a grant or admittance of a copyhold out of the manor, at what place he pleases; but the steward of the court of a manor cannot at any court held out of the manor make grants or admittances." So, in Clifton *v.* Molineux, 4 Co. Rep. 27 a, it was resolved by Wray, Chief Justice, Sir Thomas Gawdy, et tot. cur., upon evidence given to a jury, that, "if a court be held by a steward of a manor out of it, and divers grants and admittances there made, the court and all the grants and admittances are void, for, the court of the manor ought to be held within the manor, and not out of the jurisdiction of it." There is a distinction between surrenders and admittances. Thus, in Tukely *v.* Hawkins, 1 Lord Raym. 76, it was resolved that a steward of a manor may take a surrender of a copyhold out of the manor, but cannot *admit* out of the manor; and that a custom that the steward shall not take *surrenders* out of the manor is a void custom. In Bacon's Abridgment, *Copyhold* (H), 4, it is said: *"The lord himself may make admittances or grants at any place out of the manor, for he is not confined any more than any other person from granting an estate at will where he pleases. But, it being only custom which enables the steward to make such admittances or grants, that which he doth he must do upon the manor, unless there be a custom to keep a court out of the manor." In Doe d. Leach *v.* Whitaker, 5 B. & Ad. 409 (E. C. L. R. vol. 27),—where all the authorities are very elaborately discussed and considered, Lord Denman, in delivering the judgment of the court, says,—p. 434,—"The grant itself, or admittance, not being made by the lord in person, it is necessary to consider whether it was made by an authorized person. And the first question upon that is, whether the steward of a manor can admit out of the manor. It should seem that he may take a surrender out of the manor: Howsego [*622

v. Wild, 1 Roll. Abr. 500, F. 3. And so it would appear by Dudfield *v.* Andrews, 1 Salk. 184. It is so taken in Tukely *v.* Hawkins, 1 Ld. Raym. 76, and the court say that a custom to the contrary would be void. That is perhaps going a good way, for, in Dudfield *v.* Andrews, it is only by reasoning and queries that it is thought proper the steward should have such a power. But, as to an admittance out of the manor, Tukely *v.* Hawkins is express that the steward cannot admit out of the manor. And the fourth resolution in Melwich's Case, 4 Co. Rep. 26 b, and Clifton *v.* Molineux, 4 Co. Rep. 27 a, are to the same effect, though in these cases it is said that the steward cannot admit *at a court* held out of the manor. Watkins, in his Treatise on Copyholds, Vol. I., p. 253, seems to incline to the opinion that a steward may admit out of a manor; but it is only by putting queries and reasoning that he supports that opinion. But we are of opinion that a steward cannot, in his mere *623] character of steward, admit out of *the manor." Further, it is submitted that the admittance of James Gutteridge was not properly proved. The book produced by Mr. Hawkins, the steward, did not contain a proper entry of the admittance of 1810, but merely a copy made from a draft said to have been prepared by the then steward. [BYLES, J., referred to The Bishop of Meath *v.* The Marquess of Winchester, 3 N. C. 183 (E. C. L. R. vol. 32), 3 Scott 561 (E. C. L. R. vol. 36), where a case touching the right of presentation to a living by the Bishop of Meath, stated for the opinion of counsel by a Bishop of Meath in 1695, and found in the family mansion of the descendants of that bishop, was held to be evidence against a subsequent bishop of the same see, on a question touching the right of presentation to the same living.]

Lush, Q. C. (with whom was Raymond), for the defendant.—The admittance of 1782 was void for want of presentment in due time. It is quite clear, that, before the 4 & 5 Vict. c. 35, a surrender made out of court must have been presented, at the next court, in the absence of a special custom to the contrary,—Bac. Abr. *Copyhold* (G); Co. Litt. 62 a; Doe d. Priestley *v.* Calloway,—which as to this manor is negatived by the case. To entitle him to succeed, the plaintiff must establish that an admittance is sufficient without any surrender,—a proposition which clearly cannot be maintained. The title of the defendant under the admittance of 1810 is incontestable. That admittance, though made by the steward out of the manor, was valid, it not having been made *at a court* held out of the manor. And, even assuming that it was not valid per se, there was such a ratification by the lord's receipt of the fine, and the subsequent recognition of the admittance upon the rolls of the manor, as to make it good. It appears from the case that there *624] *was no court holden between the surrender in 1791 and the admittance in 1810. And, though the admittance was made out of court by the steward, a fine was paid, which it must be assumed was received by the lord. Quit-rents also were paid: and the entries in the book were duly made. The opinion thrown out in Doe d. Leach *v.* Whitaker, that a steward cannot admit out of the manor, is a mere obiter dictum. It may be that he cannot admit *at a court* out of the manor. Mr. Serjt. Scriven seems to think that the better opinion is, that the steward may admit as well as take a surrender out of the manor, provided the transaction be duly recorded on the court-rolls:

see 1 Scriven on Copyhold 111, 112; and see Parker *v.* Kett, 1 Salk. 95, 1 Ld. Raym. 658.

H. James, in reply, submitted that the mere payment of a fine to the steward did not operate an admittance,—citing Brown *v.* Dyer, 11 Mod. 73, Doe d. Tofield *v.* Tofield, 11 East 246, Viner's Abridgment, *Copyhold* (G. b.), pl. 19, and 1 Scriven on Copyhold 307, 311

Cur. adv. vult.

KEATING, J., now delivered the judgment of the court:—(*a*)

In this case the lessor of the plaintiff claimed as heir-at-law of Mary Gutteridge, his grandmother, who in 1781 was admitted tenant in fee of the lands in question (parcel of the manor of Cockernhoe, in the county of Hertford), and who in 1782 surrendered them to the use of herself for life, remainder to the use of her husband James Gutteridge for life, remainder to the use of the heirs of the said Mary. *This surrender was not presented until 1787, although several [*625 courts-baron were held in and for the manor between 1782 and 1787: but, on the 10th of March, 1787, the surrender was presented, and the said Mary was admitted, and enjoyed the lands in pursuance of such admittance.

In 1791, James Gutteridge and Mary his wife surrendered the lands in question to the use of Mary for the joint lives of herself and husband, and, in case he should survive her, to his use for life, remainder to such uses as he should appoint, with remainder to his heirs and assigns.

Mary Gutteridge died in 1796; and in 1810 James Gutteridge was, upon the surrender of 1791, admitted by the steward of the manor out of court, at his house, which was situate out of the manor; and he thereupon paid to the steward, for the use of the lord, 65*l.* as a fine upon such admittance.

In 1820, James Gutteridge, in consideration of 4500*l.*, surrendered the lands in question to the use of William Oakley (under whom the defendant claimed); and at the next general court-baron, held on the 19th of May, 1826, that surrender was presented by the homage, and Oakley admitted thereupon,—such surrender, amongst other things, reciting the admittance of James Gutteridge in 1810.

In 1830, James Gutteridge died; and, in 1845, the present action was commenced by the lessor of the plaintiff, who contended that the admittance of James Gutteridge in 1810 was invalid by reason of its being granted by the steward out of the manor, and that *his* title as heir-at-law to Mary Gutteridge under the limitations in the surrender of 1782 accrued upon the death of James Gutteridge in 1830. Another point,—that the book produced by the steward as being the court-rolls of the manor, and containing the entry of *the admittance of [*626 1810, was not admissible, as the original draft ought to have been put in,—was not much pressed, and was disposed of during the argument.

The defendant, on the other hand, insisted that the surrender of 1782, under which the lessor of the plaintiff claimed, was invalid, not having been presented at the next court-baron, and that his own title was good, upon the grounds,—first, that the admittance of 1810, although made out of the manor by the steward, was valid, not having

(*a*) Williams, J., Byles, J., and Keating, J.

been made *at a court* out of the manor,—and, secondly that, if invalid, still there had been a sufficient ratification by the lord's receipt of the fine, and the subsequent recognition of the admittance upon the rolls of the manor, to make it good.

Whatever doubts may formerly have existed on this point, we think it clear, since the case of Leach *v.* Whitaker, 5 B. & Ad. 409, that an admittance (previous to the act 4 & 5 Vict. c. 35) by the steward of a manor, as such, out of the manor, whether at a court or otherwise, was bad; but, as such an admittance would have been good if a special authority for that purpose had been given by the lord, so also it might have been rendered valid by his subsequent ratification and notification to the homage, so as to make it an admission by implication.

In the present case, the admittance in question was regularly entered in a book produced by the steward as containing the court-rolls of the manor; and, although not in form a court-roll, yet the entry is made in regular sequence with the court-rolls, in the same handwriting, and in a form very similar to the admittance of Mary Gutteridge in 1781. The fine (65*l.*) is stated in the entry to have been paid to the lord; and the case finds that it was in fact paid to the steward for his (the lord's) use. In the usual course of business, that fine would have been paid or
*627] accounted for *to the lord; and there is no evidence whatever to raise the slightest presumption of any departure from that course in the present instance. The lord had not only the legal custody of the book containing the court-rolls of the manor, but he had a direct interest in its contents; and there appears no reason to doubt that he received the fine upon the admittance in question with a full knowledge of the facts, and before the surrender to William Oakley in 1820. The entry of the admittance of 1810, although not in form a court-roll, appears from the book (which we have inspected) to have been made by the steward amongst the rolls of the manor. It is afterwards expressly referred to by the homage, at least as early as 1820, as being a valid admittance: and, looking to all these points, we think a jury, after the lapse of thirty-five years, during which time the property in question had been enjoyed, and more than once transmitted, upon the assumption that the admittance of 1810 was valid, would have been well warranted in finding, that, although at first invalid, for the reason assigned, it had been ratified by the lord and notified to the homage, so as to render it a good admittance.

Our decision upon this point makes it unnecessary that we should decide the further question, how far the surrender of 1782 was inoperative, by reason of its not having been presented at the next court-baron

The judgment will be for the defendant.

Judgment for the defendant.

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*628] *YEATMAN *v.* DEMPSEY. *Jan.* 19.

The declaration in an action for not attending as a witness, stated, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the plaintiff was about to institute in the Divorce Court, and to assist plaintiff in the manage-

ment of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, *and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues;* and the breach alleged was, that the defendant did not appear at the trial of the said issues, or tender himself to be a witness thereat, but refused and neglected so to do, by reason whereof the plaintiff was obliged to withdraw the record, and incurred costs, &c. Plea, non assumpsit.

To prove the contract alleged, evidence was given that the defendant had been engaged by the plaintiff to take care of and to watch his wife, with a view to the obtaining of proof of her insanity at the time of marriage,—upon the terms of his being paid from time to time his travelling and other expenses out of pocket, and for his fees and loss of time at or immediately after the trial; and several letters of the defendant's were put in, wherein he stated that there was ample evidence to support the plaintiff's case, and advised him to go into court at once, and promised to attend the trial *on receiving a week's notice.* In consequence of the absence of the defendant when the cause was called on for hearing, the plaintiff was obliged to withdraw the record.

The jury having found that there was a contract by the defendant to attend at the trial without a subpœna and without receiving conduct-money:—Held, that their finding was warranted by the evidence, and that the plaintiff was entitled to substantial damages, without showing that he would have succeeded in the Divorce Court with the aid of the defendant's evidence.

THIS was an action against the defendant for neglecting to attend as a witness in the Divorce Court, pursuant to his promise.

The declaration stated, that, before and at the time of making the promise thereinafter mentioned, the plaintiff was about to institute a suit in Her Majesty's Court for divorce and matrimonial causes, against Macgrathe Josephine Klothide his wife for the dissolution of their marriage, and that the defendant then was and still is a surgeon and apothecary, and exercising and carrying on the profession and business of a surgeon and apothecary: that thereupon, in consideration that the plaintiff, at the request of the defendant, would retain and employ the defendant in his capacity of surgeon and apothecary aforesaid, to collect and prepare the medical and other evidence necessary and material to the said suit, and to assist the plaintiff in the management of the said suit, and to attend and give evidence at the trial of the issues to be joined therein, for certain reasonable fees and reward in that [*629 *behalf, the defendant then promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues: Averment of performance by the plaintiff of all conditions precedent to entitle him to bring the action; and that, relying upon the defendant's said promise, and his skill and experience in his profession or business as aforesaid, the plaintiff caused such proceedings to be had in the said suit that afterwards, before the Right Hon. Sir Cresswell Cresswell, Knt., at Westminster, a certain issue before then joined in the said suit came on to be tried before a jury then and there duly chosen for that purpose; and that the appearance and testimony of the now defendant, in the performance of his said promise, were necessary and material to the trial of the said issue, and without the evidence of the now defendant the plaintiff could not safely proceed to the trial of the said issue, yet the defendant broke his promise and contract in that behalf, and did not appear at the trial of the said issues, or tender himself to be a witness thereat, but wholly refused and neglected so to do, by reason whereof the plaintiff was obliged to withdraw the record at the sai-

trial, and was compelled to pay certain great costs and expenses to the then defendant, and was hindered and delayed in the trial of the said issue.

The defendant pleaded, amongst other pleas, that he did not promise as alleged.

The cause was tried before Byles, J., at the sittings in London after last Trinity Term, when the following facts appeared in evidence:—The plaintiff, who was married in 1852, being desirous of procuring a dissolution of his marriage on the ground that the lady was insane at
*630] the time of contracting it, employed the *defendant, a medical practitioner under whose care she was placed in 1857, to collect evidence to establish his case before the Divorce Court, and attend and give his testimony at the hearing of the cause, upon an understanding that he was to be paid from time to time the travelling and other expenses incurred by him, and his professional fees after the trial. On the 8th of December, 1858, the cause being in the list for the following day, the plaintiff informed the defendant that his attendance would be required on the following morning at 11 o'clock. The defendant asked for 10*l.* on account, stating that unless he obtained it he could not attend. The plaintiff declined to give him that sum, but told him that he would be paid as the other witnesses were, viz., at or immediately after the hearing of the cause. When the cause was called on, the defendant did not appear, and the plaintiff in consequence withdrew the record. The defendant was not subpœnaed.

Amongst other evidence given to show the contract on the defendant's part to attend and support the plaintiff's case, and to show that he was a material and necessary witness, a document under the hand of the defendant was put in, whereby he certified that he considered Mrs. Yeatman insane whilst under his care, and that he was inclined to think that such had been her state of mind very early in life, probably from her birth; and certain letters from the defendant to the plaintiff were also put in, amongst which were the following:—

"South House, Long Eaton, Derby,
"March 26th, 1858.

"My Dear Sir,—I have sent you the enclosed facts. I could give you many more; but I think they are enough for judge and jury to give a verdict, if you go in for insanity. I should try adultery, if you think
*631] you *are not safe for insanity. She is incorrigible. Your brother informs me she is off again. Have you seen her or heard anything of her? If you could get her to go to the train with you, and bring her here, I would take care she never left here again without your brother wished it. If you look at the act 2 & 3 W. 4, c. 7, s. 28, you will find that my certificate, under the circumstances, would have done to have put her into an asylum. She is diseased.

"W. C. DEMPSEY."

"JOHN P. YEATMAN, Esq."

"South House, Long Eaton, Derby,
"May 14th, 1858.

"My Dear Sir,—Dr. Winslow can do no other than give a decisive opinion. You are quite safe; and I shall be glad to congratulate you. Dr. Pritchard is an authority: he is a fellow-citizen of mine, and his

son was a fellow-pupil. I should see Dr. Pritchard; and, if you like, I will do so. I should go into court at once. You have sufficient evidence; and I would not bother to get more.

"W. C. DEMPSEY."

"JOHN P. YEATMAN, Esq."

"Tudor Villa, Canton Road, Cardiff,
"November 4th, 1858.

"Dear Sir,—I have sold up and left Long Eaton, and do not know where I shall be for two or three weeks. If you could let me have 10*l.* on account you would much oblige me. I hope that you will succeed in your wishes. I have not heard or seen anything of her since I saw you in London. What does Winslow say now? Have you heard from or seen Pritchard? I shall do my best for you, only I must have a week's notice, for I do not know where I shall be. You can send me a 10*l.* note or a P. O. order here, and *I will let you know from [*632
time to time where you can find me.

"W. C. DEMPSEY."

"JOHN P. YEATMAN, Esq."

On the part of the defendant, it was submitted that there was no evidence to go to the jury of a contract by him to attend the trial of the cause in the Divorce Court without a subpœna, that there was no consideration for such a promise, and no proof of damage from his non-attendance.

The learned judge was inclined to think that there was no evidence of the contract as alleged; but he left it to the jury to say whether there was a promise by the defendant on a good consideration to attend as a witness, and a breach thereof.

The jury found that there was an absolute and unconditional promise and a breach, and they found for the plaintiff, damages 50*l.*

Pigott, Serjt., in Michaelmas Term, in pursuance of leave reserved to him at the trial, obtained a rule nisi for a new trial, on the ground that there was no evidence to sustain the declaration,—or to reduce the verdict to nominal damages, on the ground that there was no proof that the plaintiff had sustained any damage from the non-attendance of the defendant in the Divorce Court.

Macaulay, Q. C., and *Phear*, now showed cause.—The defendant's letters clearly show that he was dealing with the plaintiff on the footing of a contract as alleged in the declaration: and his general conduct, coupled with his letter of the 4th of November, 1858, show that the defendant dispensed with a subpœna. The jury must be taken to have found, that he was not entitled to receive by anticipation more than *money for actual disbursements, and that he had been fully paid [*633
for all his disbursements. It was perfectly competent for the plaintiff to make such a contract; and there can be no reason why he should not be held responsible for the breach of it. It is manifest that the evidence which the defendant upon his own showing was prepared to give could not have been supplied by anybody else. As to the damages, it will be contended on the other side that the plaintiff was bound to prove that he had good ground for his suit in the Divorce Court. But, whether he had or not, it does not lie in the mouth of the defendant to say that there was no probability of success in a suit which

was mainly to depend upon his testimony. The plaintiff has, at all events, sustained damage to the extent of the costs which he has fruitlessly incurred. [WILLES, J.—By his failure to attend to give evidence, the defendant diminishes the plaintiff's chance of success. This is not like a case where the plaintiff has manifestly no cause of action at all. By the defendant's own admission, the plaintiff here had a cause of action,—a chance of obtaining that which he sought. He had a right to have the benefit of that chance. WILLIAMS, J.—There is no averment in the declaration that the plaintiff would have succeeded in the Divorce Court if the defendant had duly attended as a witness.] It was not necessary: Davis *v.* Lovell, 4 M. & W. 687,† 7 Dowl. P. C. 178.

Pigott, Serjt., and *Beresford*, in support of the rule.—The contract as alleged in the declaration, is, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary, to collect and prepare the medical and other evidence necessary and material to the suit which the plaintiff was about to institute
*634] in the *Divorce Court, and to assist the plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, *and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues.* There is no allegation and no proof that the defendant undertook to attend as a witness without a subpœna and without conduct-money. No doubt, he undertook to look after the lady, and to endeavour to make out a case of what in one of his letters he calls dementia before the marriage: but that is all. There was no contract to dispense with a subpœna. [WILLIAMS, J.—The law gives no right to subpœna a man of science.] No doubt, each party contemplated the defendant's attending as a witness without being subpœnaed and without being paid conduct-money. But the question is, was there a *contract* to that effect? A contract such as this,—which almost amounts to a conspiracy to get up a case against the lady,—is manifestly contrary to public policy. [ERLE, C. J.—There is no plea of illegality: and no point of this sort was reserved; it therefore is not open to you.] Unless the damages are such as legally flow from a breach of some legal contract, the court will not lend its aid to enforce their recovery. The damages are a compensation or redress which the law awards to the plaintiff for a grievance which he has legitimately sustained. The substantial question, however, is, whether there is any evidence of the contract alleged in the declaration. Then, assuming that there was such a contract, and a breach of it, the plaintiff can only be entitled to nominal damages by showing that his suit failed solely in consequence of the
*635] defendant's non-attendance. For anything that appeared *here, the plaintiff's case must have failed whether the defendant attended or not; and, if so, he ought not to have damages.

ERLE, C. J.—I am of opinion that this rule should be discharged. The first question is whether there was any evidence to support the contract alleged in the declaration, which contract in effect was, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the

plaintiff was about to institute in the Divorce Court, and to assist the plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues. There was no precise and formal contract in writing or otherwise; but there was beyond all doubt to my mind conversation and correspondence between the parties which involve this, that the defendant was to get up evidence in support of the plaintiff's case, and to attend as a witness for him on the trial. The evidence which alone would support the plaintiff's case in the Divorce Court would necessarily be such as the defendant might be expected to be prepared to give. It was testimony of a nature which probably no one else could have supplied. I think it was necessarily involved in what passed between the parties, that the defendant contracted to get together the evidence and to attend at the trial and prove the plaintiff's case. Every man has full power to contract to do that *which is not [*636
prohibited by law: and, if a party chooses to contract to attend and give evidence without a subpœna and without conduct-money, I see no reason why he should not be allowed to do so. Then arises the question whether the plaintiff is entitled to recover the damages which the jury have given him for the defendant's breach of contract. It is said that the plaintiff can only be entitled to nominal damages unless it be made appear that his testimony would have insured a successful termination of the divorce suit. I think, however, it is enough if there was a probability of success. It cannot be predicted of any person's testimony that it will to a certainty sustain the case of the party on whose behalf he is called. It is always open to contradiction and to all manner of failures. Success can in any case be only a matter of probability. But here I think the defendant has by his own conduct precluded himself from saying that the plaintiff had no probability of success from his testimony. The lady was for some months under his care; and he from time to time reported to the plaintiff her state of mind: and the suit was instituted entirely upon his representation that the facts which he had thus become master of would conduct the suit to a successful issue. I think, therefore, he was not at liberty to say that his non-attendance as a witness had done the plaintiff no damage. His own statements were in the nature of an estoppel.

WILLIAMS, J.—I am of the same opinion. I think there was sufficient evidence for the consideration of the jury, that there was a contract such as that alleged in the declaration. I agree with my Brother *Pigott*, that, in order to support the declaration, the plaintiff was bound to make out that the defendant engaged to *attend and give evidence, and [*637
that without a subpœna and without conduct-money. But I think there was evidence of that here. In his letter of the 4th of November, 1858, the defendant stipulated for a week's notice. That shows that he was not to have a subpœna, which would have given him longer notice. As to the second point in the case, I must own I have entertained some doubt. But, upon consideration, I have come to the conclusion that the plaintiff was entitled to recover substantial damages. If this had been an action against the defendant for not attending in obedience to a sub-

pœna, it would no doubt have been essential for the plaintiff to show that he had a good cause of action.(a) That rule was somewhat relaxed in Cowling *v.* Coxe, 6 C. B. 703 (E. C. L. R. vol. 60). The court there held, that, since the statute 4 & 5 Ann. c. 16, where there are several issues, the absence of an allegation that the plaintiff had a good cause of action, generally, does not show that the plaintiff has not sustained some damage from the absence of the witness, inasmuch as the witness's testimony might have insured the plaintiff's success as to some one issue. But it leaves the general principle untouched, that, to entitle the plaintiff to maintain an action against a witness for non-attendance, he must allege and prove that he has a good cause of action. I at first felt some difficulty as to whether that principle should not be applied to an action like this, for the breach of a contract to give evidence at the trial. It occurred to me at the moment, that, to entitle the plaintiff to more than nominal damages, it should have been shown that the plaintiff would have succeeded by means of the witness's testimony if he had duly attended. But, upon reflection, I am satisfied that the plaintiff is entitled to sub-
*638] stantial damages. If it had appeared *as a fact that the plaintiff *could not* have succeeded whether the defendant attended or not, it would clearly have been a case for nominal damages only. But that was not shown here. The question is whether the plaintiff was bound to show, that, with the defendant's testimony, he *must* have succeeded in the divorce suit. I think not. If the defendant had attended, the matter would at all events have been investigated and brought to an end. By the defendant's breach of contract the plaintiff has been deprived of that advantage. The amount of damages was for the jury.

WILLES, J., concurred. Rule discharged.

(a) See Needham *v.* Fraser, 1 C. B. 815 (E. C. L. R. vol. 50).

Besides the penalty usually imposed by statute upon a witness for disobedience to a subpœna, an action on the case will lie at common law for the party by whom he was subpœnaed to recover any damages which he may have sustained by reason of the non-attendance of the witness; and this action is in general saved by the express words of the statute: Hasbrouck *v.* Baker, 10 Johns. 248; Courtney *v.* Baker, 3 Denio 27; Prentiss *v.* Webster, 2 Douglass 5. And a person summoned by a *subpœna duces tecum*, will be liable in damages if he fail, without reasonable excuse, to produce the books or papers required, though he appear personally and is sworn in the case: Lane *v.* Cole, 12 Barbour 680. It is not necessary in order to maintain such an action, that the suit or proceeding in which the witness was summoned, should have been finally determined, by verdict or nonsuit. It may be brought to recover the costs of a continuance or postponement of the trial, including witness fees and other damages: Hurd *v.* Swan, 4 Denio 75; Prentiss *v.* Webster, 2 Douglass, Michigan 5; Connett *v.* Hamilton, 16 Missouri 442. And in such case it will not be necessary to give the whole record of the original suit in evidence, but an exemplification of so much thereof as may be requisite to show the right of action will be sufficient: Connett *v.* Hamilton, ut supra. But in order to obtain the costs of a continuance it must appear that the failure to try the cause was on account of the absence of the witness: Hurd *v.* Swan, 4 Denio 75.

The action will not lie unless on proof that the witness had been regu-

larly subpœnaed: Hasbrouck *v.* Baker, 10 Johns. 248; Robinson *v.* Trull, 4 Cushing 249. And parol evidence is not admissible that the defendant confessed that he had been summoned without production of the subpœna itself, if it be in the power of the plaintiff: Hasbrouck *v.* Baker, ut supra. It is also necessary that the regular fees for travelling expenses and attendance, should have been actually paid or tendered to the witness: Courtney *v.* Baker, 3 Denio 27; Hurd *v.* Swan, 4 Denio 75; Robinson *v.* Trull, 4 Cush. 249. And where the witness is in attendance on the first day, his fees for the next and subsequent days must in like manner have been paid or tendered to him from time to time: Courtney *v.* Baker, ut supra; even though he did not apply to the party for them: Hurd *v.* Swan, ut supra. So where less than the legal fee was paid at the time of the service of the subpœna, it was held that the plaintiff could not recover, though no objection was made at the time by the witness, and he actually attended on one day, but went away before the cause was tried: Hurd *v.* Swan, ut supra. But in this last case Chief Justice Bronson intimated that if there had been an express waiver of his fees, by the witness, or an agreement to attend on being paid his board and travelling expenses, it would have been different. In Robinson *v.* Trull, 4 Cush. 249, however, under the express provisions of the statute in Massachusetts, it was held not to be sufficient in such an action to prove a waiver by the witness of his right to service of the subpœna, and payment of his regular fees.

It is of course necessary to show that the witness was a material one, and that some damage resulted from his non-attendance: Courtney *v.* Baker, 3 Denio 29. And therefore evidence that the plaintiff had admitted that the defendant knew nothing about the matters in controversy, is competent on the part of the latter: Courtney *v.* Baker. But the plaintiff is not obliged to prove that he had a good cause of action in the original case, where he was nonsuited by reason of the disobedience of the witness to the subpœna: Lane *v.* Cole, 12 Barbour 680.

The non-attendance of the witness may be proved by parol, and it is not necessary to produce the records of the Court to show the fact: Coggs *v.* Meeck, 12 Wend. 147. Where the right to recover is sufficiently established, it is moreover no answer that the record shows that the court before whom the original case was heard, had refused on motion to impose a fine on the witness for his non-attendance: Prentiss *v.* Webster, 2 Douglass, Michigan 5.

It seems that a count for damages at common law may be joined with one for the penalty, at least under the New York statute: Hurd *v.* Swan, 4 Denio 75; Coggswell *v.* Meeck, 12 Wend. 147. But as the action for damages is transitory, while that for the penalty is local, if joined the venue must be laid in the proper county: Coggswell *v.* Meeck, 12 Wend. 147. It may also be observed that the statutory penalty is not given by way of satisfaction to the injured party, but only as a mere gratuity and by way of punishment to the other, and the former cannot insist on it as a matter of right: Maclin *v.* Wilson, 21 Alab. 692.

In the case of Icehour *v.* Martin, Busbee N. C. 478, it was held that where two subpœnas are served on a witness, each requiring his attendance on the same day, but at places distant from each other, he is not bound to obey the writ first placed in his hands, but may make his election; and this will be a sufficient excuse for disobedience to the other.

BATEMAN and Wife *v.* LYALL and Wife. *Jan.* 12.

In an action for verbal slander not actionable per se, the declaration alleged for special damage, that, in consequence of the speaking of the words, four of the plaintiff's customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with the plaintiff in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that *he did not deal with the plaintiff afterwards*:—Held, some evidence of special damage.

THIS was an action for verbal slander of the female plaintiff by the female defendant, alleging by way of special damage loss of customers in the plaintiff's business of a baker,—the words not being in themselves actionable. The names of four persons were mentioned in the declaration as having ceased to deal with the plaintiff in consequence of the alleged slander.

At the trial before Keating, J., at the sittings in London after the last term, the four persons named in the declaration were called. Three of them stated that they had ceased to deal at the plaintiff's shop in
*639] *consequence of reports which they had heard in the neighbourhood; but neither of them stated that they had heard the defendant's wife use the words imputed to her. The fourth, one Hodgkiss, said that on a certain day he went into the defendant's shop, the defendant and his wife being both there, and that the male defendant said,—"I am surprised you should deal next door, for Mrs. Bateman," &c. The words so spoken were substantially those charged in the declaration. Hodgkiss further stated that he did not deal with the plaintiff afterwards: but he did not say that he had ceased to do so in consequence of the speaking of the words.

On the part of the defendants it was submitted that the special damage was not proved, more especially as the only words proved were said to have been spoken by the male defendant, who was only joined for conformity.

The learned judge, however, thought there was *some* evidence for the jury; and he accordingly left it to them, and they returned a verdict for the plaintiffs, damages 14*l.*

Barnard now moved to enter a nonsuit, on the ground that there was no evidence of special damage to go to the jury. [KEATING, J.—I certainly thought there was very slight evidence. The jury were evidently very strongly impressed by a good deal of evidence which I did not leave to them. WILLIAMS, J.—In Evans *v.* Harries, 1 Hurlst. & N. 251,† it was held, that, in an action of slander of the plaintiff in his business of an innkeeper, it is sufficient to allege and prove, as special damage, a general loss of custom, without stating the names of the customers who ceased to frequent the inn. Martin, B., said: "How is a
*640] public-house keeper whose only customers are persons passing *by, to show a damage resulting from the slander, unless he is allowed to give general evidence of a loss of custom? Suppose a person falsely stated that an eating-house keeper sold unwholesome food, whereby he lost his business; how is he to know the names of all his customers who left?"] That was a case of general damage, which would not entitle the plaintiff to maintain this action. [WILLES, J.—You rely upon Ward *v.* Weeks, 7 Bingh. 211 (E. C. L. R. vol. 20), 4 M. & P. 796.] Yes. At all events, the damages were excessive.

ERLE, C. J.—If the words were spoken by Mrs. Lyall of Mrs. Bateman, and those words were partly the cause of the witness's discontinuing to deal at the plaintiff's shop, surely it is evidence for the jury. There certainly was evidence here which the learned judge would not have been justified in withholding from the jury. The words were substantially proved, and there was some evidence of special damage. We cannot say the damages were excessive. That, as a general rule, is for the jury: and the case is not taken out of the general rule, even though the judge who tries the cause should think that he would not have given so much. There will be no rule.

The rest of the court concurring, Rule refused.

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*LARMAN MORDEN, Appellant; HENRY JOHN PORTER, Respondent. [*641

A complaint of trespass in pursuit of game, under the statute 1 & 2 W. 4, c. 32, s. 30, need not be made by a person having an interest in the land.

The leave and license of the occupier, to be an answer to such complaint, must precede the act of trespass.

And, *semble*, per Williams, J.,—Keating, J., dubitante,—that the party trespassing is not the less guilty of the offence because he bonâ fide *believes* that he has the license of the occupier to shoot over the land.

AT a petty sessions holden at Ely, in the Isle of Ely, on the 6th of October, 1859, before three justices of the peace for the said Isle of Ely, an information preferred by Larman Morden, of the parish of Wilburton, in the said isle, gamekeeper (hereinafter called the appellant), against Henry John Porter, of the parish of Haddenham (hereinafter called the respondent), under the 30th section of the statute 1 & 2 W. 4, c. 32, charging "for that the said Henry John Porter, within three calendar months then last past, that is to say, on the 1st of October then instant, at the parish of Wilburton, in the said Isle of Ely, did unlawfully commit a certain trespass, by entering in the day-time of the same day upon certain land in the possession and occupation of John Everitt there, in search of game, without the license or consent of the owner of the land so trespassed upon, or of any person having the right of killing the game upon such land, or of any other person having the right to authorize the said Henry John Porter to enter or be upon the said land for the purpose aforesaid, contrary to the statute in such case made and provided," was heard and determined by the said justices; and upon such hearing they dismissed the information.

The appellant being dissatisfied with this determination, as being erroneous in point of law, the following case was stated by way of appeal, pursuant to the statute 20 & 21 Vict. c. 43:—

At the hearing of the aforesaid information, it appeared that it was laid by the appellant in his character of gamekeeper to Lady Pell, who is lady of the manor of Wilburton, and that the land on which the *alleged trespass was committed, containing about nine acres, [*642 was situate in that parish, holden by copy of court-roll of that manor, and was the property of John Everitt, as stated in the information. The respondent admitted the fact of being on the land in search

of game; but pleaded leave and license from the owner and occupier, and denied the right of the appellant to prefer the information.

It appeared that the respondent, the son of a farmer and brewer in the adjoining parish, is duly certificated, and went to Wilburton on the day in question, on the invitation of one Albert Bailey, for a day's shooting; and, knowing that Lady Pell would not allow any one over her land, he from time to time inquired of Bailey, who accompanied him, but without a gun, whether they were at liberty to go into the land through which they passed, and was assured by Bailey that *he* had full liberty to go over the land in question.

John Everitt, in his examination, proved that he had not given specific permission to the respondent before the day in question: but it was proved, that, on the respondent's asking his permission the night previous to the hearing to go over his land, he had said "they might go over it and welcome, for he wished all the game in the parish was killed;" and that he also, at the same time, said, that, "if the respondent had asked him permission before this happened, he should have given it him." It was also proved by Bailey that he (Bailey) went at all times over Everitt's land, and Everitt went over his land, by mutual consent; but there was no evidence of that permission being expressly stated to extend to *shooting;* and Bailey did not take out a game certificate.

The justices being of opinion that the appellant had no such interest in the locus in quo as would support a prosecution for trespass, and that, if he had, the *respondent acted under the full impression *643] of an implied license from the owner and occupier of the land given to him through Bailey, gave their determination against the appellant, in the manner above mentioned.

The questions of law arising out of the above statement, therefore, were,—first, had the appellant, as gamekeeper of the manor of Wilburton, such an interest in all the copyhold land within the manor in the ownership and occupation of the several tenants of the manor, as would support the above information? If so,—secondly, was there in point of law evidence of such leave and license as would be, under the 30th section of the statute 1 & 2 W. 4, c. 32, a defence to an action at law for trespass, or to the said information?—thirdly, would the ex post facto leave and license form a condonation of the offence, and be held to revert back to the time of the alleged trespass?

Couch, for the appellant.—The justices have decided erroneously upon the points reserved by the case. The first question submitted is, whether the appellant as gamekeeper of the manor had such an interest as to entitle him to lay the information. That point is disposed of by the decision of the Court of Queen's Bench in Middleton *v.* Gale, 8 Ad & E. 155 (E. C. L. R. vol. 35), 3 Nev. & P. 372, where it was held, that, under the 1 & 2 W. 4, c. 32, s. 30, it is not necessary that a conviction for a trespass in search of game should purport to be, or should in fact be, at the instance or on the information of the owner or occupier of the land, or of a party interested in the game, or of a person authorized by such owner, occupier, or party. Lord Denman, after time taken for deliberation, says: "We do not find that any decision has taken place on the point: but we have considered it, and are of opinion that any person may make such complaint, and that the con-

viction was *therefore good." The next question is, whether there was in point of law evidence of such leave and license as [*644 would, under the 30th section of the 1 & 2 W. 4, c. 32, be a defence to an action at law for trespass. That section, after reciting, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction, &c.: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and license of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person, shall, for the purpose of prosecuting, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license." The facts stated in the case show that there was no license given by the occupier here. Bailey, who assumed to give leave, had himself no permission *to shoot* over the land. And, suppose he had, he clearly had no power to give any license to another. The subsequent conversation with the occupier *amounts to nothing, and could not affect the right of the informer to a moiety of the penalty, [*645 under the 4 & 5 W. 4, c. 20, s. 21.

Phear, for the respondent.—The case of Middleton *v.* Gale is not absolutely binding upon this court. [WILLES, J.—It is a decision precisely in point.] To constitute an offence under the 30th section of the 1 & 2 W. 4, c. 32, the trespass must be an invasion of the owner's proprietory rights. There was no such infringement here; for, though the occupier of the land said that he had not given the respondent express permission to shoot over it, he added, that, if he had asked permission, it would have been granted. [WILLIAMS, J.—He clearly had not obtained permission at the time he went upon the land.] There was evidence of leave and license given by Bailey, who may be assumed to have been the authorized agent of Everitt for that purpose. [WILLIAMS, J.—It appears from the case that Bailey had permission to go over the land in Everitt's occupation; but there is no evidence that he had permission to take a companion with him. This is essentially a criminal proceeding; and, to constitute the offence, it appears that there was mens rea. In The Queen *v.* Cridland, 7 Ellis & B. 853 (E. C. L. R. vol. 90), a bonâ fide claim of title to the land was held to be sufficient to oust the jurisdiction of the justices under the statute: Erle, J., saying,—"I strongly incline to the opinion that the true meaning of the statute is, that the justices ought to try whether the defendant entertained an honest belief that he had a title; and, if he had such belief, he ought not to be convicted. I think that in a criminal statute trespass

means an *intended* trespass." Here, the respondent clearly was not guilty of an *intentional* trespass: he was expressly guarding himself
*646] from being a trespasser. That this is a *criminal offence, is clear from the case of Cattell, app., Ireson, resp. 4 Jurist, N. S. 560. Lord Campbell, referring to the 23d and 38th sections of the statute, there says: "By these enactments the legislature have made it a crime to go in pursuit of game without a certificate, to be punished by fine and imprisonment. It is not like the case of a bastardy order, where the mother makes the application against the father; not for immorality or an offence against the public, but to compel him to maintain the child. Nor is it like a fiscal proceeding for a breach of the revenue laws; nor like a proceeding before magistrates to decide a civil right, or to obtain compensation for a wrong done; but it is a criminal proceeding for an offence against the game-laws."

Couch, in reply.—The case of The Queen *v.* Cridland, 7 Ellis & B. 853 (E. C. L. R. vol. 90), has no bearing whatever upon this case. Where a person goes upon land asserting title, he does not go with any criminal intention. [Williams, J.—In The Queen *v.* Pratt, 4 Ellis & B. 860 (E. C. L. R. vol. 82), the defendant was not an intentional trespasser: he, no doubt, thought he had a right to be upon the record.]

Williams, J.—I am of opinion that our judgment in this case must be for the appellant. Several questions were raised upon the argument before us. The first was as to the authority of the appellant to institute the prosecution. As to this I think we are bound by the decision of the Court of Queen's Bench in Middleton *v.* Gale, 8 Ad. & E. 155 (E. C. L. R. vol. 35), 3 Nev. & P. 372: not that I doubt the propriety of that decision; but it is enough to say that we hold ourselves bound by it. The next question is whether there was in point of law evidence of such leave and license as would be, under the 30th section of the
*647] statute 1 & 2 W. 4, c. 32, a defence to *an action of trespass or to the information. I think that question must be answered in the negative. There was no evidence in point of law of any such leave and license. The evidence was, that Everitt, the tenant, had not given specific permission to the defendant before the day in question; but that, on the defendant asking his permission *on the night previous to the hearing* to go over his land, Everitt said he might go over it, and welcome, for he wished all the game in the parish was killed; and he at the same time said, that, if the defendant had asked him permission before this happened, he should have given it him. That is, in fact, saying that the defendant had not permission at the time, and disposes of the alleged leave and license. The third question is whether the ex post facto leave and license would form a condonation of the offence, and be held to revert back to the time of the alleged trespass. That I think must also be answered in the negative. It raises the question whether the offence could be condoned by a subsequent ratification of any permission given by Bailey in the name of Everitt. Now, it seems doubtful whether any leave was given by Everitt to Bailey to shoot over the land in his occupation. But it is unnecessary to say anything about that; for, we ought not to look too scrupulously at the evidence in these cases. The meaning of the statement evidently is, that Bailey, assuming to have Everitt's authority, gave the defendant permission to shoot over the land. But there is not a word about ratification of that per-

mission. What Everitt is represented to have said, is, that, if the defendant had asked him permission, he would have given it to him. All these three questions therefore must, in my judgment, be answered against the respondent.

Another question was raised upon the argument, *viz. that we ought to affirm the decision, on the ground that, though the [*648 defendant had not the permission of the tenant to shoot over the land, it appears that he was acting under the impression that he had, and therefore was not conscious that he was a trespasser, and so the mens rea, which it said alone constitutes the offence, was absent. This point is not directly laid before us by the justices; but I think it right to express my own opinion upon it. I think it is quite clear that it is immaterial whether or not the party is conscious at the time that he is committing a trespass. The 30th section of the 1 & 2 Vict. c. 32 enacts, "that, if any person whatsoever shall commit any trespass by entering or being in the day-time upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justice shall seem meet, together with the costs of the conviction, &c.: Provided always, that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and license of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor, or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise, as hereinbefore mentioned; but such landlord, lessor, or other person shall, for the purpose of prosecuting for the offence, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or license," &c. That clause begins with a recital, that, "after the commencement of this act, game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide *some more summary [*649 means than now by law exist for protecting the same from trespassers." It contemplates that there will be an increased necessity for protecting from plunder that which was now for the first time become matter of property, and therefore provides that this summary proceeding may be taken by a common informer,—for such is the result of the decision in Middleton *v.* Gale: and then it goes on to provide that any person charged with any such trespass may prove by way of defence any matter which would have been a defence to an action of law for such trespass,—save and except that the leave and license of the occupier shall not be a sufficient defence where the landlord or lessor shall have reserved the right of killing game on the land. The meaning of that is, that, there being a general provision that that which would be a defence to an action at law shall be a defence to an information under the statute, the legislature engraft thereon an exception by saying that the leave and license of the occupier, though enough to bar an action of trespass at common law, shall be insufficient in the case of a reservation of the right of killing game by the landlord. I agree that this does not afford any strong argument in the way of showing that the party is guilty of the trespass whether there be mens rea or not: he is to be

liable to the penalty, notwithstanding he has got the permission of a person to whom the game does not belong. Nor do I think it affords any argument the other way. It leaves the question precisely as it was. If a man knows that the landlord has the right to the game, the leave of the occupier of the land affords him no justification. Still, if he is ignorant of the fact, the absence of mens rea does not alter the measure of his liability. There are other clauses which are important in considering this matter. The 46th section enacts *"that nothing in this act contained shall prevent any person from proceeding by way of civil action to recover damages in respect of any trespass upon his land, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of this act against any person for and in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence under the general issue." This appears to me to show that the remedy in each case is cumulative, though there is to be no civil action afterwards at the suit of the party instituting or concurring in a proceeding upon the statute. It is evidently a trespass whether there be mens rea or not.

*650]

It now remains to consider the authorities which have been referred to. The dictum of Erle, J., in The Queen *v.* Cridland, 7 Q. B. 853, 869, is altogether distinguishable from this case; because all that was supposed to be decided in that case was, that the general rule is, that, in case of summary convictions, justices have jurisdiction to determine whether the claim of title to real property is bonâ fide: but, if it is bonâ fide set up, they have no jurisdiction to proceed further in the matter: and that the proviso in the statute 1 & 2 W. 4, c. 32, s. 30, does not give justices jurisdiction, upon a charge of trespass in pursuit of game, to determine a claim of title to land against the wish of the defendants. I do not think the expressions which fell from the learned judge referred to in that case are at all binding upon us here. In The Queen *v.* Pratt, 4 Ellis & B. 860 (E. C. L. R. vol. 82), P. was in the daytime on a public road, carrying a gun, and accompanied by a dog. The land *on both sides of the road was the property of B., who was also lord of the manor; and on one side of the road was a cover in the actual occupation of B. P. waved his hand to the dog, which entered the cover: a pheasant flew out across the road; and P., being on the road, fired at it, and missed it. P. was convicted by two justices, under the 1 & 2 W. 4, c. 32, s. 30, of committing a trespass by being in the daytime on land in the occupation of B. in search of game. On appeal, a case was reserved in which the question for the Court of Queen's Bench was, whether the evidence supported the conviction. And it was held, that the road was land in the occupation of B., subject to the right of way in the public; and that there was evidence that P. was not on the road in the exercise of the right of way, but for another purpose, namely, in search of game, and so was a trespasser,—which was sufficient to support the conviction. There, the whole discussion was whether or not the defendant had been guilty of a trespass in pursuit of game on another person's land. Nobody for a

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moment suggested that he was not liable because he *thought* he had a right to be on the highway. And there is no hardship in this decision: for, a person who goes out to shoot should take care that he has the leave of the person who is authorized to give it; and we should go far to defeat the act of parliament if we gave way to any arguments as to inconvenience. At the same time, though I am of opinion that our decision must be in favour of the appellant, I cannot so decide without expressing great regret at being compelled to do so; nor can I refrain from expressing an opinion that the proper sum to be awarded against the respondent would be one farthing.

WILLES, J.—I am entirely of the same opinion, and can add nothing to what has fallen from my Brother *Williams, except that, for the same reason that I think a farthing would be a sufficient [*652 penalty for the offence I think the costs of this appeal should not be allowed to the appellant.

KEATING, J.—I am entirely of the same opinion with respect to the three questions which have been submitted to us by the justices, all of which I agree should be answered in favour of the appellant. If it were necessary to decide the question raised as to mens rea, I should require time for consideration before I assented to the doctrine that it was not necessary that the trespass should be an intentional one. My present impression is, to deal with the compound offence of trespass in pursuit of game. And, although the statute provides that any person charged with any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass, yet, inasmuch as the offence includes a trespass, it might well be that the legislature intended that that which would be an answer to an action for the trespass should also be an answer to a proceeding of this sort. Appeal allowed, without costs.

*MARSHALL, Clerk, *v.* THE BISHOP OF EXETER and Another. *Feb.* 25. [*653

A bishop has no right to demand from the presentee of a benefice before he will institute him, a testimonial from the bishop of another diocese in which the party has had cure of souls, of his "honest conversation, ability, and conformity to the ecclesiastical laws of England."

Quære, how far the Canons of 1603 are binding on the laity?

Semble, that the 48th Canon of 1603 has no application to the institution of clerks to livings, but only to the service of cures and in churches and chapels by curates and ministers who are not the incumbents.

QUARE IMPEDIT. The first count of the declaration stated, that Henry Bishop of Exeter and John Henry Coats Borwell, clerk, were summoned to answer Peter Charles Marshall, clerk, of a plea that they permit the said Peter Charles Marshall, clerk, to present a fit person to the parish church of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county of Cornwall, which is vacant, and belongs to his presentation; and thereupon the said Peter Charles Marshall, clerk, by Henry Dupleix, his attorney, complains, for that whereas he the said Peter Charles Marshall, to wit, on the 15th of November, 1855, was seised of

the rectory and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, whereunto the advowson of the rectory and vicarage of the church aforesaid did and doth belong, in his demesne as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Peter Charles Marshall, clerk, as his clerk, who, on the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign Lady the now Queen of Great Britain and Ireland; and, he the said Peter Charles Marshall, clerk, being so seised of the said rectory and vicarage, in the county aforesaid, whereunto the
*654] advowson of the said rectory and *vicarage of the church aforesaid did and doth belong, the said church and rectory and vicarage, to wit, on the 3d of August, 1857, became vacant by the resignation of the said church and rectory and vicarage then duly made by him the said Peter Charles Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him.

The second count stated, that whereas also he the said Peter Charles Marshall, clerk, to wit, on the 15th of November, 1855, was seised of the advowson of the church, rectory, and vicarage of St. James and Cuby, otherwise Keby, otherwise Tregony, otherwise Tregony Martin, otherwise Tregony and Cuby, in the county aforesaid, as of gross by itself, as of fee and right; and, being so seised thereof as aforesaid, he the said Peter Charles Marshall, clerk, afterwards, to wit, on the day and year last aforesaid, presented to the said church and rectory and vicarage himself the said Peter Charles Marshall, clerk, as his clerk, who on the presentation of himself the said Peter Charles Marshall, clerk, was admitted, instituted, and inducted into the same, in the time of peace, in the time of our sovereign Lady the now Queen of Great Britain and Ireland: and, he the said Peter Charles Marshall, clerk, being so seised of the said advowson as in this count aforesaid, the said church and rectory and vicarage, to wit, on the 3d of August, 1857, became vacant by the resignation of the said church, rectory, and vicarage then duly
*655] made by him the said Peter Charles *Marshall, clerk, to, and accepted by, the aforesaid bishop as and then being Bishop of Exeter and ordinary in that behalf, whereby it then and there belonged and now belongs to the said Peter Charles Marshall, clerk, to present a fit person to the said church and rectory and vicarage, so being vacant as aforesaid: But the said bishop and John Henry Coats Borwell, clerk, will not permit him the said Peter Charles Marshall, clerk, but unjustly hinder him: Wherefore he the said Peter Charles Marshall, clerk, saith that he is injured and hath sustained damage to the extent of 3000*l.*, and therefore he brings his suit, &c.

Plea. The said Henry Bishop of Exeter and John Henry Coats Borwell, clerk, by Frederick Sanders, their attorney, come and defend

the wrong and injury when, &c.: And the said John Henry Coats Borwell says that he is parson impersonate of the said church in the declaration mentioned, by the collation of the said bishop; and the said bishop says that the said church is in his diocese, and that he hath not and doth not claim to have anything in the said church, except the admission, institution, and induction of parsons to the said church, and such other things as belong to the ordinary of the place as ordinary: And the defendants further say, that, after the said church became vacant and void by the resignation of the plaintiff, then and thence and still being a clerk in Holy Orders, and the acceptance of such resignation by the defendant Henry Bishop of Exeter in the declaration mentioned, to wit, on the 16th of January, 1858, the plaintiff, being so seised as in the declaration mentioned, by writing under his seal, bearing date, to wit, the day and year last aforesaid, presented to the said bishop, so being such ordinary as aforesaid, one John Reid as his clerk, and requested the said bishop to admit, institute, and induct the said John Reid as his clerk to *the said church so vacant and void as aforesaid: And the defendants further say that the said John Reid had not been [*656 ordained by the said Bishop of Exeter, or by any former or other bishop of the diocese of Exeter, and that, at the time the said John Reid was so as aforesaid presented to the said bishop, and of such presentation so being made, to wit, on the day and year last aforesaid, the said John Reid was a clerk in Holy Orders, and then came from a diocese in England other than the diocese of Exeter, to wit, from the diocese of Manchester, and not elsewhere or from any other diocese, and in which diocese he had then lately been a minister of the Church of England, and had then lately held a benefice and cure of souls; and the said John Reid was then wholly unknown to the said Henry Bishop of Exeter: And thereupon, afterwards, to wit, on the day and year last aforesaid, the said John Reid, so being presented upon such presentation as aforesaid, and so coming from such other diocese as aforesaid, applied to the said Bishop of Exeter to admit, institute, and induct him the said John Reid to the said church, so being vacant and void as aforesaid; but the said John Reid did not bring or produce to the said Henry Bishop of Exeter, from the bishop of the said diocese whence he came, and wherein he had lately held such benefice and cure of souls as aforesaid, and been a minister as aforesaid, to wit, from the Bishop of Manchester, any sufficient testimony, according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or any such testimony as he the said bishop was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence the said John Reid had come, and in which he so had *lately held [*657 a benefice, and cure as aforesaid; but the said John Reid then, to wit, on the day and year aforesaid, when he so applied to be admitted, instituted, and inducted as aforesaid, brought testimony from the bishop of the diocese aforesaid, to wit, from the Bishop of Manchester, which he the said Henry Bishop of Exeter held not to be, and which was not, sufficient testimony according to the ecclesiastical laws of England, of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of

England to require and have and receive from the bishop of the said diocese from whence the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid; and thereupon then the said Henry Bishop of Exeter, to wit, on the day and year last aforesaid, informed the said John Reid that the testimony so brought by him from the said Bishop of Manchester was not testimony which he the said Henry Bishop of Exeter deemed and adjudged to be, and which was, sufficient testimony of his the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the diocese from whence he the said John Reid had come, and in which he had so lately held a benefice and cure of souls as aforesaid; and the said Bishop of Exeter required further and sufficient testimony from the said Bishop of Manchester according to the ecclesiastical laws in that behalf, to wit, testimony of his the said John Reid's honest conversation, ability, and conformity to the said ecclesiastical laws,—of which the said John Reid then had notice, to wit, from the said Henry
*658] *Bishop of Exeter; and thereupon, to wit, on the day and year last aforesaid, the said John Reid departed and went away from the said Bishop of Exeter, and the said John Reid never returned or came to the said bishop again; and such further and sufficient testimony as aforesaid from the said Bishop of Manchester never was obtained from such bishop, although a long space of time sufficient to enable the said John Reid to obtain such testimony, and to come again to the said Henry Bishop of Exeter, elapsed before such collation by the said Henry Bishop of Exeter, as hereinafter mentioned; and the said Henry Bishop of Exeter, after the said John Reid so departed and went away from him the said bishop as aforesaid, not only never had or obtained or received from the said John Reid, or otherwise, any sufficient testimony from the said Bishop of Manchester, or any other testimony whatever, of the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England; but, in fact, he the said Henry Bishop of Exeter, before such collation as hereinafter mentioned, had and received from the said Bishop of Manchester, and otherwise, further testimony, from which he the said Bishop of Exeter was induced to believe, and did believe, and had good and sufficient reason for believing, that the said John Reid had, whilst being a beneficed clergyman and having cure of souls within the diocese of the said Bishop of Manchester, been guilty of an attempt to commit the offence of simony, to wit, by soliciting a certain other clerk in Holy Orders, to wit, one Francis Minden Knollys, to enter into a simoniacal contract with the said John Reid touching a certain other benefice then held by the said John Reid, contrary to the ecclesiastical laws of England in that behalf, and that he was not a person of honest conversation, or a person who conformed
*659] to the ecclesiastical laws of *England, or a fit and proper person to be admitted, instituted, or inducted to the said church,—all which premises he the said John Reid long before the collation hereinafter mentioned well knew; and, by reason of the premises, the said Bishop of Exeter, as such ordinary as aforesaid, after the lapse of six months from the avoidance of the said living, and within six months from such lapse, to wit, on the 1st of March, 1858, the said church still being and

remaining vacant and void, collated the said church to the said defendant John Henry Coats Borwell, his clerk, and put him in the corporeal possession thereof, as it was lawful for the said bishop as such ordinary to do: And this the defendants are ready to verify; whereupon they pray judgment if the plaintiff ought to have or maintain his aforesaid action against them.

The plaintiff joined issue on the plea, and further replied, that, at the time of the presentment to the said bishop of the said John Reid as his the plaintiff's clerk, and of the request to the said bishop to admit, institute, and induct the said John Reid as his the plaintiff's clerk to the said church, as in the plea mentioned, the said John Reid was, and theretofore had been, and thenceforth always continued to be, a person of honest conversation and sufficient ability, and one who conformed to the ecclesiastical laws of England, and a fit and proper person to be admitted, instituted, and inducted to the said church, and was not guilty of any attempt to commit the offence of simony as in the said plea mentioned: that the said testimony brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter when he the said John Reid so applied to be admitted, instituted, and inducted, and which the said Henry Bishop of Exeter held not to be, and which is alleged in the said plea not to have been, sufficient testimony, according to the ecclesiastical laws of England, of his *the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as he the said Bishop of Exeter was bound and ought by the laws ecclesiastical of England to require and have and receive from the bishop of the said diocese from which the said John Reid had come, and in which he had so as aforesaid lately held a benefice and cure as aforesaid, was and is in the words and figures following, that is to say,— [*660

"To the Right Reverend Henry Lord Bishop of Exeter.

"We whose names are hereunder written testify and make known that the Rev. John Reid, M. A., clerk, formerly of St. John's College, Cambridge, and late of the rectory of Claughton, in the county of Lancaster, presented to the rectory of Tregony with the vicarage of Cuby annexed, in the county of Cornwall, in your Lordship's diocese, hath been personally known to us for the space of three years last past; that we have had opportunities of observing his conduct; that, during the whole of that time, we verily believe that he lived piously, soberly, and honestly, nor have we at any time heard anything to the contrary thereof; nor hath he at any time, as far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the united Church of England and Ireland: and, moreover, we believe him in our consciences to be, as to his moral conduct, a person worthy to be admitted to the said benefice. In witness whereof we have hereunto set our hands this day, 9th of January, 1858.

"W. B. Grenside, M. A., vicar of Malling, in the county of Lancaster.

"J. M. Wright, rector of Tatham, in the county of Lancaster.

"R. J. Shields, incumbent of Hornby, in the county of Lancaster.

*"The subscribers are beneficed in the diocese of Manchester. Mr. Reid was long resident on his benefice; but I know no [*661

reason why he should be legally hindered from his being allowed to take other duty. "J. P. MANCHESTER."

which said testimony was duly signed by the said Bishop of Manchester: that, from the time of the said bringing of the said testimony from the said Bishop of Manchester to the time of the collation by the said Bishop of Exeter of the Rev. John Henry Coats Borwell, as by the said Bishop of Exeter in the said plea alleged, and which is the same and only collation by which the said defendant John Henry Coats Borwell became, was, or is parson impersonate of the said church in the declaration mentioned as by him alleged, the said Bishop of Exeter continued to require from the said John Reid a further testimony from the said Bishop of Manchester, satisfactory to the said Bishop of Exeter in those respects wherein the said testimony so brought by the said John Reid from the said Bishop of Manchester to the said Bishop of Exeter was held by him the said Bishop of Exeter not to be, and alleged by him in the said plea not to be, sufficient, and the said Bishop of Exeter never gave notice to the said John Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that he the said Bishop of Exeter required the said further testimony to be procured by the said John Reid, or brought by him to the said Bishop of Exeter within any fixed or specified time; or that he the said Bishop of Exeter would not receive the same after the lapse of six months from the avoidance of the said living, or after any specified time, nor did the said Bishop of Exeter ever at any time or in any way notify to the said John Reid or to the plaintiff, nor did the said John Reid or the plaintiff ever

*662] know, that the said *Bishop of Exeter had finally determined not to wait any longer for or to receive any such further testimony from the said Bishop of Manchester, or that the said Bishop of Exeter had finally decided to persist in his objections to the said first testimony as insufficient: that, from the time of the bringing of the said first-mentioned testimony as aforesaid, and thence continually until and at the time of such collation as aforesaid, negotiations between the said Bishop of Exeter and the said John Reid as to whether the said bishop would persist in requiring any further and what testimony to be procured by the said John Reid from the said Bishop of Manchester, in order to the admission, institution, and induction of the said John Reid by the said Bishop of Exeter to the said church, were pending, and neither the said John Reid nor the plaintiff ever had any notice from the said Bishop of Exeter, nor ever in fact knew, before the said collation, that he the said Bishop of Exeter would or did claim to collate the said John Henry Coats Borwell, or any clerk of him the said Bishop of Exeter, to the said church: and that, save and except as aforesaid, the said Bishop of Exeter never at any time before the said collation by him of the said John Henry Coats Borwell, clerk, refused to admit, institute, and induct the said John Reid as the plaintiff's clerk to the said church.

The plaintiff also demurred to the plea, the ground stated in the margin being, "that the facts set forth in the plea do not show any lapse entitling the said bishop to collate the defendant Borwell."

The defendants demurred to the plaintiff's second replication, the ground of demurrer stated in the margin being, "that the replication does not show that lapse had not duly occurred." Joinder.

Coleridge (with whom was *Collier*, Q. C.), for the *plaintiff.(*a*)— The plea is bad, upon the following grounds,—first, that no letters testimonial at all are required by law,—secondly, assuming that they are, the bishop is not the absolute judge of the sufficiency of letters testimonial, that a mere assertion by the *bishop that they are insufficient will not make the plea good, but that it ought to dis- [*663 [*664

(*a*) The points marked for argument on the part of the plaintiff were as follows:—

"*As to the plea.*—That the plea shows no lapse entitling the bishop to collate the defendant Borwell: that it shows nothing to justify a refusal of the said bishop to admit, institute, and induct the said John Reid as the plaintiff's clerk: that it does not allege as a fact that the said John Reid was in any respect not of honest conversation, ability, or conformity to the ecclesiastical laws of England, or otherwise disqualified for being admitted, instituted, and inducted to the said church; but only alleges that the said bishop had and received testimony from which he was induced to believe and did believe, and had good and sufficient reason for believing, that the said John Reid had attempted to commit the offence of simony, and was not a person of honest conversation, or a person who conformed to the ecclesiastical laws of England, or a fit and proper person to be admitted, instituted, and inducted to the said church; and that the said John Reid knew that the said bishop had had and received such testimony from which he was so induced to believe and did believe, and had good and sufficient reason for so believing; which said mere belief of the said bishop, even for good and sufficient reason, did not justify a refusal to admit, institute, and induct the said John Reid to the said church: that the said testimony which the plea alleges that the said bishop required to be produced by the said John Reid, to his honest conversation, ability, and conformity to the ecclesiastical laws of England, was testimony which the said bishop was not in point of law entitled to require, and the non-production of which did not justify the said bishop in his refusal to admit, institute, and induct the said John Reid to the said church:

"That the said bishop was not in point of law entitled to require of the said John Reid any testimony as to the matters last aforesaid, but was bound to ascertain for himself the truth as to all such matters: that the plea does not show any refusal by the said bishop to admit, institute, and induct the said John Reid, excepting by the actual collation of the defendant Borwell; and, for want of such refusal prior to such collation, no lapse had accrued entitling the said bishop so to collate the defendant Borwell:

"That the plea does not show any absolute or final refusal of the said bishop before the said collation to admit, institute, and induct the said John Reid: that it is consistent with the plea, and is to be inferred from it, that the said bishop until the time of the said collation reserved his final decision as to a refusal to admit, institute, and induct the said John Reid, and continued merely to require further and sufficient testimony from the said Bishop of Manchester to the said John Reid's honest conversation, ability, and conformity to the ecclesiastical laws of England, without any notification to the said John Reid, that, unless such further and sufficient testimony were procured, or were procured by any given time, he the said Bishop of Exeter should refuse to admit, institute, and induct the said John Reid: that the plea does not allege, otherwise than by the said collation, any final or absolute refusal at all by the said Bishop of Exeter to admit, institute, and induct the said John Reid, or any notification to the said John Reid or the plaintiff of any such refusal, but merely alleges facts which are consistent with the said Bishop of Exeter never having finally or absolutely refused, and never having refused at all, except by the said collation, to admit, institute, and induct the said John Reid: that, until a refusal and a final and absolute refusal, to admit, institute, and induct the said John Reid, no lapse could in point of law accrue to the said Bishop of Exeter entitling him to collate Borwell or any other clerk of him the said Bishop of Exeter:

"*As to the replication,*—That it shows that the said John Reid was in all respects qualified to be admitted, instituted, and inducted to the said church: that the testimony of the Bishop of Manchester set forth in the replication, was upon the face of it sufficient to entitle the said John Reid to be admitted, instituted, and inducted to the said church; and that the said Bishop of Exeter was not entitled to require any further or other testimony from the said Bishop of Manchester or from any other person whomsoever:

"That the facts disclosed in the replication show, that, except by the collation of Borwell, there was no final or absolute refusal nor any refusal by the said Bishop of Exeter to admit, institute, and induct the said John Reid: and that the replication shows such conduct on the part of the Bishop of Exeter as prevented any lapse from accruing until a formal refusal of the said Bishop of Exeter to admit, institute, and induct the said John Reid, and notice thereof to the said John Reid or the plaintiff, or until the negotiation disclosed in the replication had wholly ceased."

close some specific matter of insufficiency,—thirdly, that the plea contains no averment of a refusal on the part of the bishop to admit, *665] institute, and induct Mr. Reid,—fourthly, *that the plea contains no averment of notice to the patron of the insufficiency of the letters testimonial,—fifthly, that the ground of refusal alleged by the bishop in the second part of his plea, viz., that he believed Mr. Reid to have been guilty of an attempt to commit simony, was no sufficient ground,—sixthly, that no issue can be taken on the plea as it stands. The last ground is probably involved in the second.

1. The bishop is not entitled to ask for letters testimonial at all. It is not contended that the bishop has not a right to examine a person who is presented to him for institution. That is placed beyond all doubt by the Articuli Cleri, c. 13, and Coke's commentary thereon, 2 Inst. 631. The right to examine "de idonietate personæ" is conceded: but the claim of letters testimonial rests upon a misconception of the law. The law upon the subject is laid down in Gibson's Codex, Vol. 2, pp. 806, 807, where the learned author comments on the Canons of 1603. The 39th Canon is as follows:—"No bishop shall institute any to a *666] benefice who hath been ordained by any other bishop, *except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and, lastly, shall appear, upon due examination, to be worthy of his ministry." Dr. Gibson's comment upon that is,—"By the ancient laws of the Church, and particularly of the Church of England, the four things in which the bishop was to have full satisfaction in order to institution, were, ætas, scientia, mores, et ordo. And there is scarce one thing which the ancient Canons of the Church more *peremptorily* forbid than the admitting clergymen of one diocese to exercise their function in another, without first exhibiting the letters *testimonial* and *commendatory* of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell show that the same was the known law of the English Church, viz., that none should be admitted to officiate (not so much as a *chaplain* or *curate*) in any diocese in quâ oriundus sive ordinatus non fuerit (as the latter expresses it), nisi deferat secum *literas ordinum* suorum, atque *literas commendatitias* diocesani sui. If, then, this is the common as well as canon law of the Church of England, and is not contradicted by any statute, and is a thing most reasonable in itself, the judgment given in the Court of King's Bench, 33 Eliz, 'that the clerk is not *bound* to show his letters of orders, or missive, to the bishop, and that his not showing them is no good cause to stay the admittance,'(*a*) doth certainly deserve a second consideration." The conclusion which Gibson draws is not warranted by the premises: and the letters testimonial which the *667] bishop required in this case are essentially *different from the literas commendatitias mentioned by Gibson. The authorities he relies on are two constitutions or decrees of Archbishop Walter and Archbishop Arundell, which are to be found in Lynwood's Provinciale, pp. 47–49. It appears from these constitutions or decrees themselves, and from the somewhat voluminous glosses thereon, that they have nothing whatever to do with the presentation of an incumbent to a

(*a*) Palmes v. The Bishop of Peterborough, 1 Leon. 230, Cro. Eliz. 241.

living, but they simply relate to the case of priests or deacons coming without leave of the bishop of one diocese to officiate and administer the sacraments in another diocese. The constitution of Walter is entituled "De Clericis Peregrinis," and is as follows:—"Ordinati in Hibernia, Wallia, seu Scotia, vel alibi, sine literis ordinariorum suorum commendatitiis vel dimissoriis non admittantur à quocunq. infra provinciam nostram ad ordinis sic suscepti executionem, nisi magna necessitas inducat: et tunc quod cum eis auctoritate sufficienti fuerit dispensatum super executione ordinis memorati, vel aliis à suis ordinariis ordo sic susceptus ratificetur. Proviso nihilominus quod nullo modo admittantur, nisi prius constiterit de eorum legitimai ordinatione, vitæ munditia, pariter et literatura. Item præcipimus ne sacerdotes ignoti, de quorum ordinatione non constat, ad Divinorum celebrationem deserviendo ecclesiis admittantur; nisi de licentia episcopi diœcesani cûm per literas testimoniales, vel testimonium bororum vinorum eis, de eorum verè constiterit ordinatione, et sufficienter fuerit facta fides." This clearly points only to the exercise of the spiritual functions of the clergy of that day. The next decree, that of Archbishop Arundell, is as follows:—"Nullus capellanus mittatur ad celebrandum in aliqua diœcesi nostræ Cantuariensis provinciæ, in qua oriundus sive ordinatus non fuerit, nisi deferat secum literas ordinum suorum atque literas commendatitias diœcesani sui. Et *nihilominus aliorum episcoporum, in quorum diœcesibus [*668
interim per magnum tempus conversatus est, in quibus expressi caveri volumus, et mandamus de moribus et conversatione ejusdem; et an sit diffamatus de et super aliquis novis opinionibus in fide catholica, aut bonis moribus male sapientibus; vel sit de eisdem omnino immunis. Alioquin tam ipse celebrans, quàm ipsum sic celebrare permittens, acriter puniatur." These latter words show that the whole object of the constitution was the protection of the Divina officia in a parish supposed to be already supplied with a competent celebrant. Lyndwood's note on these words "Tam ipse celebrans" is as follows,—"Et nota, quoad iste celebrans punitur in casu isto propter inobedientiam, quia contra formam hujus ordinationis præsumit celebrare: licet enim constitutio hæc expresse non prohibeat talem celebrare, sed prohibeat eum admitti ad celebrandum. Tamen tacitè videtur hujus constitutionis lator voluisse, quod absque ostensione literarum, de quibus hic dicitur, sicut nec debet admitti, sic nec ipse se debet ingerere ad celebrandum. Et puto quod ea quæ hic dicuntur intelligi debent de tali qui publicè celebrat; secus tamen esset, si in secreto hoc faciat ex devotione." There is nothing here to deprive patrons of their civil rights. All the Roman canon law authorities preserve an absolute silence about literæ commendatitiæ or literæ dimissoriæ. Neither Ferraris,(a) nor Barbosa,(b) nor Johannes Devotus,(c) make any mention of them. The real origin of the literæ commendatitiæ or literæ dimissoriæ is probably to be found in the mode of election of bishops and priests, to which in ancient *times the consent of the laity was essential. It was a breach [*669
of ecclesiastical discipline of the gravest character for a priest or deacon ordained in one diocese to quit without the permission of his

(a) "Prompta Bibliotheca Canonica, Juridica, Moralis, Theologica," Venet. 1782, 10 tom. fol.

(b) "De Officio et Potestate Episcopi." Lugduni, 1679, 3 tom. fol.

(c) "Institutionum Canonicarum, libri iv."

bishop, for the purpose of exercising his spiritual functions in another diocese. The subject is very fully gone into in Bingham's Origines Ecclesiasticæ, Vol. 1, pp. 135, 157, 222, 223, where mention is made of Origen, one of the ablest men the Christian Church ever produced, who was severely censured for quitting the diocese of Alexandria and going to Cæsarea. In truth, these constitutions were as much in restraint of the bishop himself as of the lower clergy. The bishop is empowered to examine in order to satisfy himself of the idoneity of the person presented to him,—that he is not a drunkard, an adulterer, or schismaticus inveteratus, &c.: but, if not satisfied, he must put the grounds of his dissatisfaction upon record. The bishop's discretion is limited where the rights of the patron are involved. Presumably a clerk in orders is a fit and proper person to be admitted, instituted, and inducted into a living; and there is no allegation in this plea that Mr. Reid was unfit, but merely that the bishop chose to be dissatisfied with his testimonials. Many cases might be suggested where a clerk would be unable to procure testimonials in the required technical form. For instance, he might have been resident abroad for eight or ten years; and, though a man of immaculate virtue, he might be unable to obtain a testimonial such as that set out in this replication. Is the bishop to take advantage of this, and to collate by lapse, and so deprive the patron of his right? If this power is to be conceded to bishops, knowing as we do that the more conscientious and in earnest men are the less tolerant they become, the scruples of two bishops may at any time render a present-
*670] ment nugatory. [WILLES, J.—Are there any *means of compelling the bishop to countersign the letters testimonial?] None. Palmes *v.* The Bishop of Peterborough, 1 Leonard 230, Cro. Eliz. 241, is precisely in point.(*a*) That case is referred to in Gibson 806, 807, and in Stephens's Law of the Clergy 524, and is also commented upon in Dr. Stillingfleet's Ecclesiastical Cases, edit. 1702, Vol. III., p. 637. In the report in Cro. Eliz., Anderson, J., says: "The bishop might examine him on oath if he is in orders or not; but, as to letters testimonial of his good behaviour and sufficiency, the bishop ought to examine the same himself: and the bishop cannot refuse a clerk for want of letters testimonial." [WILLES, J.—In Burn's Ecclesiastical Law, *Benefice*, p. 156, where that case is referred to, it is said: "By the provincial constitutions at Oxford in the time of Henry II., the bishop is required to admit the clerk who is presented without opposition, within two months, 'dum tamen idoneus sit,' if he thinks him fit. So much time is allowed 'propter examinationem,' saith Lyndwood, even where there is no dispute about right of patronage. The main thing he is to be examined upon, is, *his ability to discharge his pastoral duty*, as Coke calls it, or, as Lyndwood saith, whether he be 'commendandus scientiâ et moribus.' As to the former, the bishop may judge himself, but, as to the latter, he must take the testimony of others. If the bishop refuses to admit within the time (which by the modern Canons is limited to twenty-eight days after the presentation delivered,—Canon 95), he is liable to a duplex querela in the ecclesiastical courts and a quare impedit at common law, and then he must certify the reasons of his refusal: 5 Co. Rep. 57. In Specot's Case it is said, that, in 15 H. 7, 7, 8, *all*

(*a*) An examined copy of the roll in Palmer v. the Bishop of Peterborough was produced and handed to the court.

*the *judges agreed that the bishop is judge in the examination, and therefore the law giveth faith and credit to his judgment.* [*671 But, because great inconveniences might otherwise happen, the general allegation is not sufficient, but he must certify *specially* and *directly;* and the general rule is, and it was so resolved by the judges, *that all such as are sufficient causes of deprivation of an incumbent are sufficient causes to refuse a presentee.* But by the canon law more are allowed. In the constitutions of Othobon, the bishop is required to inquire particularly into the life and conversation of him that is presented; and afterwards, that, if a bishop admits another who is guilty of the same fault for which he rejected the former, his institution is declared null and void. By the canon law, if a bishop maliciously refuses to admit a fit person, he is bound to provide a proper benefice for him; but our ecclesiastical law, much better, puts him upon the proof of the cause of his refusal. But, if the bishop does not examine him, the canonists say that it is a proof sufficient that he did it malitiosè. If a bishop once rejects a man for insufficiency, he cannot afterwards accept or admit of him, as was adjudged in The Bishop of Hereford's Case, Moore 26, Cro. Car. 27. If a man brings a presentation to a benefice, the bishop is not barely to examine him as to life and abilities, but he must be satisfied that he is in orders. How can he be satisfied unless the other produces them? How can he produce them, when it may be they are lost? The Canon is express *that no bishop shall institute any to a benefice who hath been ordained by any other bishop,*—Canon 39 (for, if he ordained himself, he cannot after reject him, because the law supposes him to have examined and approved him),—*except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour*, if the bishop shall require it; and, lastly, shall appear upon *due examination to be worthy of the ministry. But yet, in Palmes and The Bishop of Peterborough's Case, Cro. Eliz. [*672 241, 1 Leon. 230, it was adjudged that no lapse did accrue by the clerk's not showing his orders, for the bishop upon his not coming to him again collated after six months. But the court agreed that the clerk ought to make proof of his orders, but they differed about the manner of their proof. Anderson said that the bishop might give him his oath. But, if a proof were necessary, and the clerk did not come to make proof, it seems to me to be a very hard judgment."] In Godolphin's Repertorium Canonicum, which is a work of considerable authority, it is said (p. 273), that "none shall be made minister or admitted to preach or administer the sacraments under the age of twenty-four years, and unless he bring with him to the bishop a sufficient testimonial, and be able to render an account of his faith in Latin; all which appears by the statute of the 13 Eliz. (c. 12), whereby it is likewise provided that none shall be admitted to any benefice with cure or above the yearly value of 30*l.* in the King's books, unless he shall be a bachelor of divinity or a preacher lawfully allowed by some bishop within this realm, or by one of the universities of Oxford or Cambridge; and that all admissions to benefices, institutions, inductions, tolerations, dispensations, qualifications, and licenses whatsoever made contrary to the premises shall be utterly void in law." The *statute* does not require that. The 1st section, "that the churches of the Queen's Majesty's dominions may be served with pastors of sound religion,"

enacts "that every person under the degree of a bishop which doth or shall pretend to be a priest or minister of God's Holy Word and sacraments by reason of any other form of institution, consecration, or ordering than the form set forth by parliament in the time
*673] *of the late King, of most worthy memory, King Edward the 6th, or now used in the reign of our most gracious sovereign Lady, before the feast of the Nativity of Christ next following, shall, in the presence of the bishop or guardian of the spiritualities of some one diocese where he hath or shall have ecclesiastical living, declare his assent and subscribe to all the articles of religion, which only concern the confession of the true Christian faith and the doctrine of the sacraments, comprised in a book imprinted, intituled 'Articles whereupon it was agreed by the archbishop and bishops of both provinces and the whole clergy in the convocation holden at London in the year of our Lord God 1562, according to the computation of the Church of England, for the avoiding of diversities of opinions, and for the establishing of consent touching true religion, put forth by the Queen's authority;' and shall bring from such bishop or guardian of spiritualities, in writing under his seal authentic, a testimonial of such assent and subscription." That has no relation to the letters testimonial in question in the present case. The 5th section provides "that none shall be made minister, or admitted to preach or administer the sacraments, being under the age of twenty-four years; nor unless he first bring to the bishop of that diocese, *from men known to the bishop to be of sound religion*, a testimonial both of his honest life and of his professing the doctrine expressed in the said articles, nor unless he be able to answer and render to the ordinary an account of his faith in Latin according to the said articles, or have special gift or ability to be a preacher; nor shall be admitted to the order of deacon or ministry, unless he shall first subscribe to the said articles." That has reference only to the case of ordination and admission to preach. In Comyns's Digest, *Eeglise* (I.),
*674] it is said, that, "If a patron brings a quare *impedit against the bishop upon the refusal of his clerk, the plea of the bishop ought to show a certain and particular cause of refusal; for, it is not sufficient to say generally 'quod non fuit idoneus,' or 'quod fuit criminosus,' &c.; or that he was a haunter of taverns, ob quod et alia crimina, &c. That he was a schismatic, without showing how. But 'quod fuit minus sufficiens in literaturâ, et eâ ratione inhabilis,' is sufficient; for, it is in the negative, and does not consist of a single instance, but general ignorance."

2. Assuming that letters testimonial are necessary, the bishop is not the absolute judge of their sufficiency. The plea is clearly bad for not showing that the bishop's rejection of Mr. Reid's testimonials was founded upon sufficient reasons. In 2 Inst. 631, in Sir E. Coke's commentary upon the Articuli Cleri, it is said: "In a quare impedit brought against a bishop for refusal of the clerk, he must show the cause of his refusal specially and directly (for, whether the cause thereof be spiritual or temporal, the examination of the bishop concludes not the plaintiff), to the intent the court, being judges of the principal cause, may consult with learned men in that profession, and resolve whether the cause be just or no; or the party may deny the same, and then the court shall write to the metropolitan to certify the same; or,

if the cause be temporal, and sufficient in law (which the court must decide), the same may be traversed, and an issue thereupon joined, and tried by the country." Much learning upon this subject is to be found in Brooke's Abridgment, *Quare Impedit*, pl. 12, 64, and 119, where various causes of refusal are stated to be sufficient if pleaded. Thus, in pl. 12, it is said: "It was agreed that non-ability, non-age, and criminousness are sufficient causes for the ordinary to refuse the clerk." If the refusal be on the ground of non-ability, *the fact should be stated: so, non-age is a matter of fact which is traversable: so, criminousness is a matter of fact traversable by the clerk and the patron, and triable by a jury. In pl. 64, in quare impedit the bishop pleaded that the presentee had been perjured in a cause between the bishop and the chapter, and so criminous; and it was held a good plea: and reference is made to the Year Book, 38 E. 3, fo. 2, where all the circumstances under which the alleged perjury took place are set out. So, in pl. 119, it is said by Keble, that "bastard, villenage, criminosus, non-age, and non-ability, are good causes for refusing a presentee." All the cases will be found in Viner's Abridgment, *Presentation* (Z. a.), —"In quare impedit, the bishop returned, that, at the time of the presentation of the presentee, and all the time of his commorancy within his diocese, he *commonly haunted taverns* and other places, and unlawful and prohibited games, ob quod et diversa consimilia crimina the said presentee was criminosus. And, by all the justices, the particular defects above do not make the presentee criminosus, because none of them deserve refusal; for, they are only mala prohibita. Specot's Case, 5 Co. Rep. 57, cites this case to be adjudged; and that the words 'ob diversa crimina' are too general and uncertain." "It is good cause of refusal, because the presentee was perjured," &c., "because he is a villein," "that he has killed a man," "because he is simonaicus" in the same or another presentment. "Non-ability and criminosus are sufficient causes for the ordinary to refuse the clerk." "If a miscreant [a misbeliever or infidel] or schismatic be presented and inducted, this is good cause of deprivation. 5 Rep. 58, in Specot's Case, cites 5 R. 2, tit. *Tryal*, 54, and says it was agreed to be good law: so, if he be irreligious, he may be refused, as it is said in 5 H. 7, fo. 6. But, when he is charged with *the one, or refused for the other, *it must be alleged particularly*, so that the party may answer thereto." The cause of refusal must be alleged with certainty. [ERLE, C. J.—Is not "schismaticus inveteratus" sufficiently certain?] It would seem so. Specot's Case is commented on by Lord Ellenborough in The King *v.* The Archbishop of Canterbury, 15 East 117. That was a mandamus to the Bishop of London to admit a lecturer, to which the bishop returned that he had examined the party, and conscientiously disapproved of him. Lord Ellenborough draws the distinction between that case and the case of a bishop refusing to collate. He says,—"A strict analogy does not hold between the means of obtaining a license for a lectureship and the other situations in the church to which it has been compared: nor is a lectureship in point of right like the case of a temporal inheritance in an advowson or the like, where the patron is entitled to call upon the ordinary to institute his clerk, and to enforce that right by quare impedit, unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented

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is not fit. In the statute of Articuli Cleri, which is not merely an enacting statute, but, as Lord Coke says, declaratory of the common law and custom of the realm, the 13th chapter runs thus,—"Also it is desired that spiritual persons whom our lord the King doth present unto benefices of the church (if the bishop will not admit them either for lack of learning or for other reasonable cause), may not be under the examination of lay persons in the cases aforesaid, as it is in these times in fact attempted, contrary to canonical decrees; but that they may sue to an ecclesiastical judge, to whom it of right belongs, for the obtaining remedy as may be just.' The answer is, 'Of the *fitness* of a *677] parson presented to an ecclesiastical benefice, the *examination*' *(it will be recollected that *examination* is not the term in the statute 13 & 14 Car. 2, but *approved*, and the word *examination*, taken strictly, may be understood to mean a personal oral examination, such as usually takes place for the ascertaining a competence in literature), —'the examination,' it says, 'belongs to the ecclesiastical judge; and so it has heretofore been used and shall be so in future." This statute relates in express terms to the case of the ecclesiastical benefices properly so called; and there I admit that the bishop must, if questioned for refusing institution to a clerk presented to him in a suit of quare impedit, in his plea state the cause of such his refusal." That is a distinct recognition of the authority of Specot's Case for the only purpose for which it is here cited. Lord Ellenborough says that the authority of Specot's Case is very much shaken by Hele *v.* The Bishop of Exeter, 3 Levinz 313, 1 Lutw. 348, 2 Lutw. 1094, Holt 609 (E. C. L. R. vol. 3), 4 Mod. 134, 2 Salk. 539, Comb. 239, Carthew 311. The question there was, whether a general plea of "minus sufficiens in literatura" was sufficient: the Courts of Common Pleas and Queen's Bench held that it was not, but that the bishop should state in what respect the clerk was "minus sufficiens;" but their judgments were reversed by the House of Lords,—The Bishop of Exeter *v.* Hele, Show. P. C. 88. Although Shower gives the arguments of counsel at very great length, the report is altogether silent as to the ratio decidendi: but there are some observations at the end of the report in Carthew which would seem to show the ground upon which the decision of the House of Lords proceeded:—"The bishop brought a writ of error in parliament, and there the judgment was reversed: all that was urged was, that Hodder [the presentee] did not understand the Latin tongue; *678] for, upon the bishop's examination, he could not translate *the number thirty-nine into Latin." There is nothing in that case which is inconsistent with the proposition here contended for, that, whether the bishop acts upon good or bad grounds, they ought to appear on the face of his plea, in order that there may be an opportunity given for contesting the fact. Sufficiency in literature seems to be the only matter in which the bishop is the sole and absolute judge. Doctrine is examinable by the archbishop. And, according to Lord Coke, where the ground of rejection is criminousness, bastardy, felony, &c., it must be specially stated, in order that the matter may be inquired into by the proper tribunal,—the courts of law in some cases, a jury in others.

3. There is no averment in the plea of a refusal on the part of the bishop to admit, institute, and induct Mr. Reid; and, until there was such distinct refusal, there could be no lapse. The plea appears to

have been taken from an old precedent in the Year Book, H. 7, cited in 1 Leonard 230, where the presentee went to the bishop and found him going out hunting, and asked him then to examine him, and the bishop told him he could not examine him at that time, but that if he would come in a week he would. The presentee never came again, and, six months having passed, the bishop presented on lapse.(*a*) That case has no application here; for, the bishop in this case never appointed any time for the examination of Mr. Reid.

4. Then, the plea is further bad for want of an averment of notice to the patron of the insufficiency of the letters testimonial. As a general rule, there can be no lapse without notice to the patron. To this rule, there are doubtless some exceptions; but the present case does not form one of them. That there *must be notice to the [*679 patron before a lapse can occur, is distinctly laid down in Brooke's Abridgment, *Quare Impedit*, pl. 83, 90, 102, and in Fitzherbert's Abridgment, *Quare Impedit*. [WILLIAMS, J.—A distinction is taken between a spiritual and a temporal cause.] Dr. Ayliffe, in the Parergon Juris Canonici Anglicani, p. 333, says: "I have before observed, that, according to Bernard de Compostella and others, when a patron presents a very unfit and unworthy person for institution to a living, a devolution is thereby made to the bishop. But the canonists say that this has a respect only to ecclesiastical patrons, and does not happen when a lay patron presents such an unfit person, though he should do it knowingly. And herein Hostiensis seems primâ facie to agree with Compostella, saying, that, when the first person presented is unworthy, a lay patron presenting such a clerk may (perhaps) repent thereof; yet he afterwards appears to contradict himself, by adding that the diocesan in admitting of a second presentation is said to gratify the patron, because he may repel the second presentee, since the patron has presented a clerk that is minus idoneus. But Johannes Andreas says, that, if a lay patron presents an unfit person, he has till the end of four months to present a fit one; and thus he may vary his presentation. But Hen. de Bowick will have it that a lay patron cannot, even within four months, vary his presentation, unless the bishop admits of such variation. And thus the doctors are divided in their opinions about this matter. But I think, that, even in the sense of the canon law, a lay patron may vary his presentation within four months, even without the bishop's consent; and, whether he presents an unfit person knowingly or ignorantly, such a presentation shall not hinder a second to be made, especially before such a presentation is tendered to the bishop. With *us here in England, no devolution happens on [*680 the account of the unfitness of the presentee: but the bishop ought to give notice to the patron of the unfitness of his clerk; and then, if the patron shall not present another within the six months, a lapse ensues thereupon." In Viner's Abridgment, *Presentation* (R. b.), it is said, pl. 1,—"If the ordinary refuse a clerk because he is criminous, he ought to give notice thereof to the patron; otherwise, no lapse shall incur." "If (pl. 2) the ordinary refuse a clerk for a private cause, as, if the clerk upon the examination of the ordinary confesses himself to be a common adulterer, or that he comes to the presentation by usury and the like; in this case the ordinary is bound to give notice

(*a*) Viner's Abridgment, *Presentation* (R. b.), pl. 11.

thereof to the patron, or otherwise no lapse shall incur." "So (pl. 3), notice ought to be given of a refusal for a notorious crime, as, because he is a common adulterer or a common murderer." "If (pl. 4) a *lay patron* presents a clerk who is refused because he is not well lettered, no lapse shall incur without notice given to the patron of this refusal." "If (pl. 5) a *spiritual patron* presents a clerk who is refused for default of literature, there lapse shall incur without notice, because the law intends that he might have sufficient knowledge of his sufficience before he presented him." Again, pl. 12, "If the bishop refuse a clerk because he is a villein, as he may do, he shall give notice thereof to the patron, whether he be lay or spiritual." It seems, therefore, that the lay patron is in all cases entitled to notice of refusal by the bishop, except in the case of a crime or a disability created by act of parliament; and that there is no distinction between the case of an ecclesiastical and a lay patron, except the refusal be for insufficiency of literature. [WILLIAMS, J.—Do you understand a spiritual patron to mean simply a clerk in Holy Orders?] It means one who presents
*681] in right *of his spiritual position: Stephens's Laws of the Clergy 523.

5. The ground of refusal alleged by the bishop in the second part of his plea, viz., that he believed Mr. Reid to have been guilty of an attempt to commit simony, was no sufficient ground of refusal. Bishop Stillingfleet mentions the different causes of refusal of institution; but he nowhere suggests that an attempt to commit simony is one of them. These are also summed up in Burn's Ecclesiastical Law, tit. *Benefice*, III. "The most common and ordinary cause of refusal," it is said, "is want of learning. But there are also many other causes for which a clerk presented may lawfully be refused; as, if he be perjured before a lawful judge; or, if he be an heretic or schismatic, or irreligious; or (as it is said in the old books), if he is a bastard, and not dispensed withal; or, if he is within age; or, if he or his patron be excommunicated for the space of forty days; or, if he be outlawed, or guilty of forgery, *or hath committed simony in the procuring the presentment he brings, or of another presentment to a former benefice;* or hath committed manslaughter, that is, if he be attainted thereof, and not pardoned. And it is said that the ordinary may refuse a clerk upon his own knowledge, for an offence committed by him which is a good cause of refusal, although he be not convicted thereof by the law; and this shall be tried by issue whether it be true or not: and, generally, all such as are sufficient causes of deprivation are also sufficient causes of refusal." An attempt to commit simony, assuming the statement to be true, is clearly no ground of deprivation. Nothing is more obscure than the law as to simony. To amount to anything, the plea should show the circumstances under which the attempt to commit simony was made. There is no allegation of any fact upon which issue could be taken.

*The sixth point is in reality included in the second.

*682] The replication raises substantially the same questions as the plea does. The letters testimonial set out in the replication are primâ facie sufficient. The authorities show that the bishop's right to examine the presentee is limited to age, morals, doctrine, and sufficiency in literature. If he was entitled to ask for testimonials, the replication shows that he has had them.

Karslake (with whom was *M. Smith*, Q. C.), contrà.(*a*)—*The plea is good, and the replication bad. The main question is, whether the Canons not only enable but make it imperative on the bishop to require to be furnished with letters testimonial or commendatory before he institutes a clerk coming from another diocese. It *is to be observed that all the actors in this case are ecclesiastics. One of the questions to be discussed is, whether the Canons of [*683 [*684

(*a*) The points marked for argument on the part of the defendant were,—

"*As to the plea*,—That the plea is good, and affords a complete answer to the declaration: that, under the circumstances stated in the plea, there was no disturbance of the plaintiff, and that he was not hindered, as alleged:

"That the plea shows a good right to collate by lapse: that it shows that the plaintiff (who was himself a clerk in Holy Orders) presented a clerk who had not been ordained by the defendant, the bishop, or by any other bishop within the diocese of Exeter: that the presentee came from the diocese of Manchester, and applied to the defendant, the bishop, for institution and induction, but did not bring or produce to the said bishop sufficient testimony of his honest conversation, ability, and conformity with the ecclesiastical laws of England, the testimony which he brought being and having been held by the defendant, the bishop, to have been insufficient: that the bishop required further and sufficient testimony of the presentee's honest conversation, ability, and conformity with the ecclesiastical laws of England, which the presentee did not bring or produce; and that the presentee having notice of the requirement of the bishop, and having departed from the bishop, never returned to him, and never brought such sufficient testimony:

"That such further and sufficient testimony was never obtained, but the said bishop received from the Bishop of Manchester further testimony, from which he believed, and had good reason for believing, that the said presentee had been guilty of an attempt to commit simony, and was not a person of honest conversation, all which the presentee, Reid, well knew: that a sufficient time to enable the presentee to obtain the further and sufficient testimony elapsed before collation by the defendant, the bishop, and such testimony never having been furnished, the bishop as ordinary, after the lapse of six months from the avoidance, collated the other defendant:

"*As to the replication*,—The replication affords no answer to the plea. The replication, after alleging that Reid was of honest life and a fit person, and that he had not been guilty of attempt at simony, sets out at length the testimony which the plaintiff alleges was brought by John Reid, the presentee, to the defendant, the Bishop of Exeter, and which the said bishop held to be insufficient and such as he was not bound to accept. It states that the bishop, from the time of the bringing of the said testimony to the time of collation, continued to require from Reid, the presentee, a further testimony from the Bishop of Manchester: that the said bishop never gave notice to Reid or the plaintiff, nor ever gave them or either of them to understand or be informed or believe, that the said bishop required the said testimony to be procured within any fixed or specified time, or that the said bishop would not receive the same after the lapse of six months from the avoidance, or after any specified time, nor ever gave notice to Reid or the plaintiff, nor did either of them know, that the Bishop of Exeter had finally determined not to wait any longer for or to receive such further testimony, or that the said bishop had finally determined to persist in his objections to the first testimony as insufficient: that, from the time of bringing the first testimony up to the time of collation, negotiations between the defendant, the bishop, and Reid, as to whether the said bishop would persist in requiring any further and what testimony to be procured by the said John Reid, were pending, and that neither Reid nor the plaintiff had notice or knew that the bishop claimed to collate the other defendant or any clerk to the said church: that, save as aforesaid, the said bishop never before collation of the other defendant refused to institute the said John Reid as the plaintiff's clerk.

"The plaintiff therefore admits by his replication that the defendant, the bishop, held the testimony brought to be insufficient, and does not allege that it was sufficient:

"If the plaintiff intends to submit as matter of law that the testimony set forth was sufficient, and such as the bishop was bound to accept, the defendants contend that the court cannot decide as matter of law that the bishop was not justified in his decision, or that the testimony was such as the bishop was bound to receive:

"Further, the defendants contend that the testimony set out on the face of the replication was not such testimony as the bishop was bound to accept, or ought to have accepted:

"But, besides, the plea states, and the replication admits, that the defendant, the bishop, before collation, received further testimony from the Bishop of Manchester leading to the

1603, as they are called, assuming that they do not proprio vigore bind
*685] the laity, are not binding upon a clerk who comes to the bishop *for institution, as well as upon the bishop himself; and whether the patron, being himself a clerk in Holy Orders, is not equally bound. Before instituting, the bishop is bound to inquire and to ascertain whether the clerk who is presented to him is fit ecclesiastically as well as otherwise. Many of the Canons re-enacted in 1603 are ancient Canons, and are merely declaratory of the ancient usage and laws of the church. The first of these which was relied on on the other side is the 39th, which provides that "no bishop shall institute any to a bene-
*686] fice who hath been ordained by any other *bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it; and, lastly, shall appear, upon due examination, to be worthy of his ministry." The 48th Canon (Gibson's Codex 896), which was not cited, provides that "no curate or minister shall be permitted to serve in any place, without examination and admission of the bishop of the diocese, or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese to another, shall not be by any means admitted to serve without testimony of the bishop of the diocese, or ordinary of the place as aforesaid, whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the Church of England. Nor any shall serve more than one church or chapel upon one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places be not able in the judgment of

belief that Reid was not a fit person (and showing, therefore, that the said bishop was right in construing the testimony brought by Reid as an insufficient testimony and a testimonial couched in unusual and ambiguous language); and it is also admitted that Reid knew all this long before collation took place: the testimony received from the Bishop of Manchester was clearly unsatisfactory and insufficient:

"The allegation that the defendant, the bishop, did not give notice to the plaintiff or Reid, or give either of them to understand, that the bishop required the testimony within any fixed or specified time, or that the bishop would not receive the same after the lapse of six months, and the following allegations, are naught, and do not answer or affect the plea. The defendant, the bishop, required testimony sufficient and satisfactory to him; and he was not bound nor ought he to have fixed a time within which the testimony should be procured, or to give any such notices or notifications as it is stated he did not give. Reid came to the bishop with an imperfect and insufficient testimony; he was required to obtain a perfect and sufficient one; and he went away and never came back or obtained any perfect or sufficient testimony, although he knew that the bishop had additional testimony of an unfavourable character. The right and duty of the defendant, the bishop, to collate on lapse was complete:

"The allegation as to negotiations pending is also naught. The defendant, the bishop, is not stated to have agreed to waive the right to collate upon lapse, if lapse accrued, or to institute Reid without favourable testimony, or to have induced the plaintiff or Reid to suppose that the bishop would not collate. Reid had to obtain sufficient testimony in his favour from the bishop of the diocese whence he came: he never did what was required, and never again came to the bishop with or obtained any further testimony. He had sufficient time to obtain it, and neglected to do so. He admits that he knew that the defendant, the bishop, not only had not favourable and sufficient testimony, but that he actually had unfavourable testimony from the Bishop of Manchester, and he obtains no better testimony:

"Refusal to admit, institute, or induct Reid was not under the circumstances necessary. Reid neglected and omitted to do that which the bishop properly and in compliance with law and his duty as the bishop required of him: therefore the defendant, the bishop, after the lapse of six months, rightfully collated the other defendant to the living."

the bishop or ordinary as aforesaid to maintain a curate." Idoneity of the clerk is for the bishop in the first instance. The patron, whether a spiritual person or a layman, must present a clerk who can satisfy the bishop that he is idoneus. The history of these Canons is very fully gone into in the Preface to Burn's Ecclesiastical Law, p. 20 et seq., and also in Gibson's Codex, and Ayliffe's Parergon, in all of which they are assumed to be binding on the clergy. In Middleton *v.* Croft, 2 Stra. 1056, 2 Atk. 650, the plaintiff declared that by statute 7 & 8 W. 3, c. 35, a penalty of 10*l.* is inflicted on every man who marries without license or banns, notwithstanding which he and his wife had [*687 *been cited into the spiritual court for being married before 8 in the morning without license or banns; contrary to the Canon, which fixes the time to be between 8 and 12, and requires a license or banns; that they are lay persons, not bound by the Canon; and therefore pray a prohibition. Lord Hardwicke, in giving judgment, says: "In this case, three questions have been made,—first, whether by the Canons of 1603 lay persons are punishable for a clandestine marriage,—secondly, if not, whether by the canon law anciently received the spiritual court has a jurisdiction to proceed for a clandestine marriage,—and, thirdly, supposing they have a jurisdiction either way, whether that jurisdiction is taken away by the act of parliament, which has inflicted the penalty of 10*l.*" His lordship refers to the 102d, 103d, and 104th Canons, and goes into the question of their binding effect; and certainly the conclusion he comes to is that the Canons of 1603 do not proprio vigore bind the laity. He then proceeds to discuss the authorities. "The first," he says, "is The Prior of Leeds's Case, 2 H. 6, fo. 12 b, Brooke, *Ordinary* 1, where it is expressly laid down that the ordinary has power to make holidays, fasting-days, and constitutions provincial de lyer le clergy, mes nemy de lyer le temporalty. The next case, M. 24 E. 4, fo. 44 b, where though there is some difference in opinion upon the power of the convocation, yet as to the point now in question it is agreed on both sides. In 5 Co. 32 b, Cawdrie's Case, my Lord Coke lays it down that by general consent of the whole realm Canons may be made or altered. In Moore 755, Plowd. 43, 2 Co. 37, the question proposed is, whether the deprivation of the puritan ministers was lawful; and the judges said it was, because the King had delegated them full power, as he might. That a parliamentary confirmation is necessary, see Carth. 485, 1 *Salk. 134.(*a*) And I have seen two manu- [*688 script reports of that case in Carthew, by my Lord Raymond(*b*) and C. J. Eyre, both of which agree with the report. In Mod. Cas. 188,(*c*) in a suit for not coming to church, Holt says, if you have a Canon before 1603, it may bind:(*d*) and in Davis's Case, Mich. 5 G. 1,

(*a*) Bishop of St. David's *v.* Lucy. "'Tis very plain that all the clergy are bound by the Canons confirmed only by the King, but they must be confirmed by the parliament to bind the laity." Per Holt, C. J., Carth. 485.

(*b*) See 1 Lord Raymond's Reports 447.

(*c*) 6 Modern, 188, Britton *v.* Standish. The report says that Powell, J., differed "totis viribus" from Holt, C. J., and that Gould, J., agreed with Powell. The 6th, 7th, 8th, and 9th volumes of the Modern Reports are sometimes in the old books cited, as here by Holt, C. J., as "Modern Cases."

(*d*) The dictum of Holt, C. J., is as follows,—"A jurisdiction allowed to them (*i. e.* the ecclesiastical courts) time immemorial must be taken to belong to them by law; but what I doubt at present is, whether this be so: and, if there be any ancient Canon for it, and received here before 1603, I will agree with you; but, if not, *no Canon since*, though in full convocation, can, proprio vigore, bind the laity."

in C. B., King, C. J., laid it down as a prevailing opinion that the Canons of 1603 did not bind the laity. Having thus considered the cases which warrant our opinion, let us now take notice of the three cases relied on against it. The first is in Moore 781,(*a*) a very extraordinary case, and no precedent, for there both were clerks; and though it is laid down pretty strongly as if a bishop could bind his diocese, yet it is not said that he could bind the laity therein. The second case is, Vaughan 327,(*b*) and what he says there is certainly right, that a *lawful Canon* is the law of the kingdom as well as an act of parliament. But does he define what is a lawful Canon, or that it will bind the laity without their consent? On the contrary, in the very next paragraph *689] he speaks of a Canon, as warranted by *act of parliament. And as the case in 2 Ventris 41,(*c*) where Vaughan says, though no Canons are confirmed by parliament, yet they are the laws which govern in ecclesiastical affairs,—I observe that was only a dictum upon a motion, and was at the time expressly contradicted by J. Tyrrell, who holds that the King and convocation without the parliament cannot make any Canons which shall bind the laity." [WILLIAMS, J.—Lord Hardwicke's judgment in that case is a prodigy of industry and learning. WILLES, J.—There are abundant instances in which the Canons would afford no answer to an action by one clergyman against another in the temporal courts. Many of them have fallen into desuetude,—that as to the wearing of copes, for instance.] In 4th Inst. 323, Sir E. Coke says: "Subscription required by the clergy is twofold,—one, by force both of an act of parliament confirming and establishing the thirty-nine articles of religion agreed upon at the convocation of the Church of England, and ratified by Queen Elizabeth under the Great Seal of England,—another, by Canons made at a convocation of the Church of England, and ratified by King James, as is aforesaid." He then proceeds to state what must be done by a clerk who comes for institution. "He must," he says, "also bring a testimonial from men known to the bishop to be of sound religion, a testimonial both of his private life and profession of the doctrine expressed in the said articles, and he ought to be able to answer and render to the ordinary an account of his faith in Latin. Besides this subscription, when any clerk is admitted and instituted to any benefice, he is sworn to canonical obedience to his diocesan." In Moore *v.* Moore, 2 Atk. 157, Lord Hardwicke clearly holds the Canons of 1603 to be binding on the clergy. "It is very surprising," he says, "when Canons with respect to marriages have laid down *690] directions so *plainly for the conduct of ecclesiastical officers and clergymen (which, though they have not the authority of an act of parliament, and consequently are not binding upon laymen, yet certainly are prescriptions to the ecclesiastical courts, and likewise to clergymen), that there should be such frequent instances of their departing from them, and introducing a practice entirely repugnant to them." [WILLIAMS, J.—The expression he uses, is, "prescriptions to the clergy."] In Bird *v.* Smith, F. Moore 781, it is said (3d resolution): "Ils resolve que les Canons del esglise fait per le convocacōn et le Roi sans parliament, lieront en touts matters ecclesiastical cy bien come acte

(*a*) Bird *v.* Smith.
(*b*) Hill *v.* Good.
(*c*) Grove *v.* Dr. Elliott.

de parliament, car ils diont que per le common ley chescun evesque en son diocess, archevesque en son province, convocation meason en le nacōn, poit faire Canons de lier deins lour limits." [WILLES, J.—The Canons only profess to be binding in causes ecclesiastical: this is a cause temporal. WILLIAMS, J.—There is another objection to these Canons being held to be binding to the extent you are contending for, in the case of Moor *v.* Moor, as reported in Barnardiston, C. C. 404, 410, viz. that the King may dispense with them. Now, the King cannot dispense with the law of the land.]

The Canons of 1603, or at all events that one which requires the production of letters commendatory where the clerk comes from another diocese, have been adopted and are binding as part of the law of the land. The statute 25 H. 8, c. 19, referred to in the preface to Burn's Ecclesiastical Law, shows that these Canons were received and adopted as part of the law of England. In Britton *v.* Standish, 6 Mod. 188, Lord Holt says,—"If you have a Canon before 1603, it may bind: and Lord Hardwicke, referring to that, in Middleton *v.* Croft, says (2 Stra. 1060): "It has been already proved that the received Canons bind the laity; and this appears by our statute law, 25 H. 8, *c. 21, in the preamble, and 35 H. 8, c. 16, which continues the force of [*691 Canons accustomed and used: and here rests the ecclesiastical power." In Dr. Burn's Preface, p. 30, after citing the case of Middleton *v.* Croft, it is said: "In the aforesaid case the point was not in question whether or how far the said Canons are obligatory upon the clergy. It seemeth generally to be understood that they are binding in that respect. And it is to be observed that there are very many particulars in those Canons which are taken from the ancient Canon law received here before the said statute of 25 H. 8 (c. 19). And therefore, upon this head, it is to be inquired how much of those Canons is agreeable to the ancient canon law, and how much is added of new by the convocation of 1603; for, in the former case, the same will be obligatory both upon the clergy and laity, and in the latter case upon the laity only." The antiquity of the Canons in question is vouched by Gibson, by Lyndwood, and by Watson. They are also referred to in Howel's Synopsis Canonum SS. Apostolorum, a work of great authority in the church; Vinnius, Vol. 1, p. 1; Godolphin's Repertorium Canonicum 591. It is said that these Canons applied only to wandering clerks going into a foreign diocese, and not to clerks presented for institution. Their language, however, is general, and applies to all clerks going from one diocese to another. If it be necessary that the clerk should be fortified with letters commendatory for the purpose of enabling him to perform Divine service and administer the sacraments in a foreign diocese, à fortiori must it be so where he comes to be instituted and inducted into a cure of souls there. The heading of the constitution of Archbishop Walter is as follows,—Lyndwood's Provinciale, p. 47,—"De Clericis Peregrinis;" and it begins, "Externiat que ignoti sine ordinariorum suorum literis commendatitiis vel dimissoriis non admittantur ad ordinis executionem, sine *suffi- [*692 cienti dispensatione, atque de ordinatione eorum habitâ approbatione, et per episcopum admissione." It would be an unjustifiably narrow construction to hold that to apply only to wandering priests coming into the diocese for a temporary purpose. The constitution of Archbishop Arundell, which is to be found in Lyndwood, p. 48, is,—

"Nullus capellanus admittatur ad celebrandum in aliqua diœcesi nostræ Cantuariensis provinciæ, in qua oriundus sive ordinatus non fuerit, nisi deferat secum literas ordinum suorum, atque literas commendatitias diœcesani sui," &c. In Bingham's Origines Ecclesiasticæ, edit. 1834, Vol. 1, p. 562, edit. 1843, Vol. 2, p. 181, Book vi., Ch. iv., § 4, which is headed "No clergyman to remove from one diocese to another without the consent and letters dismissory of his own bishop," it is said,—"Another rule, designed to keep all clergymen strictly to their duty, was, that no one should remove from his own church or diocese without the consent of the bishop to whose diocese he belonged. For, as no one at first could be ordained, but must be fixed to some church at his first ordination; so neither, by the rules and discipline of the church then prevailing, might he exchange his station at pleasure; but must have his own bishop's license, or letters dismissory, to qualify him to remove from one diocese to another. For this was the ancient right which every bishop had in the clergy of his own church, that he could not be deprived of them without his own consent; but as well the party that deserted him as the bishop that received him were liable to be censured upon such a transgression. 'If any presbyter, deacon, or other clerk,' say the Apostolical Canons,(*a*) 'forsake his own diocese to go to another, and there continue, without the consent of his own bishop, we decree that such an one shall no longer *693] *minister as a clerk (especially if after admonition he refuse to return), but only be admitted to communicate as a layman; and if the bishop to whom they repair still entertain them in the quality of clergymen, he shall be excommunicated, as a master of disorder.' The same rule is frequently repeated in the ancient councils, as that of Antioch, the first and second of Arles, the first and fourth of Carthage, the first of Toledo, and the councils of Tours and Turin, and the great council of Nice, to whose Canons it may be sufficient to refer the reader. I only observe that this was the ancient use of letters dismissory, which were letters of license granted by a bishop for a clergyman to remove from his diocese to another; though we now take letters dismissory in another sense. But the old Canons call those 'dismissory' letters which were given upon the occasion that I have mentioned." Many passages confirmatory of this view are to be found in Van Espen, Commentarius in Canones Juris veteris ac novi, Vol. III., pp. 56, 160, 228, &c.; and in Devotus, Vol. II., tit. 22, p. 211, "De clericis peregrinis" (Rome, 1837). In Spelman's Concilia, Vol. I., 152, the Concilium Herufordiæ, held on the 24th of September, 673, contains two decreta or Canons relating to Clerici peregrini,—"Quintum. Ut nullus clericorum relinquens proprium episcopum, passim quolibet discurrat, neque alicubi veniens absque commendatitiis literis sui præsulis suscipiatur. Quod si semel susceptus est, et noluit invitatus redire, et susceptor et is qui susceptus est excommunicationi subjacebet. Sextum. Ut episcopi atque clerici peregrini contenti sint hospitalitatis munere oblato, nullique eorum liceat ullum officium sacerdotale absque permissu episcopi, in cujus parochia esse cognoscitur, agere." In 2 Spelman's Concilia, p. 378, is set out the Synod of Exeter, held in 1287, the 37th chapter or Canon of which is *694] headed *"Ne alienæ ordinationis presbyter sine examinatione et literis dimissoriis admittatur." The Canon is as follows:—

(*a*) Can. Apost. c. xv. et xvi. (xiv., xv., tom. 1, Conc. Labbe, p. 28).

"Quia clerici criminosi, vel in natalibus patientes defectum, aut vel inhabiles ad ordines suscipiendos, nonnunquum à suis diocesanis fugiunt, ut ab alienis episcopis ordines consequantur, quibus ne dum suos celant defectus, sed quod detestabilius est, sæpe mentiuntur ordines se habere, vel majores habere quàm habeant. Sancti patres proinde statuerunt, ne quisquam episcoporum alterius diocesis clericos ordinaret absque sui episcopi licentiâ et literis commendatitiis: alioquin tam ordinatores quàm ordinatos ab executione sui officii suspenderunt. Hinc est, quod districtè prohibemus, ne archidiaconi vel quisquam alius clericum quemcunq. nostræ diocesis, ab alieno episcopo ordinatum, ad celebrandum in nostrâ diocesi prius admittant, donec literas commendatitias sui inspexerint ordinatoris, per quas constat eis totaliter ordinatum, à nobis prius literas dimissorias habuisse: aliter etenim suspensus remaneat ordinatus quousque secum duxerimus dispensandum. Cum vero ordinatus fuerit alterius episcopatus, et ordinationis similiter alienæ: statuimus, ut absque literis commendatitiis sui episcopi, et examinatione diligenti super honestate et literatura, ad parochias custodiendas vel celebranda divina, peregrinando nullatenus admittatur, vel remissius procedatur in ipsis sub pœnâ excommunicationis. Interdicimus ne à quocunque sacerdote quicquam detur vel recipiatur pro licentiâ celebrandi. Inhibemus etiam ut nullus sacerdos celebrare præsumat, donec loci ordinario fuerit præsentatus, et per ipsum (ut convenit) approbatus." Gibson's commentary on the Canons of 1603 (Codex, Vol. 2, p. 806) is also a strong authority in favour of the necessity for letters testimonial and commendatory. He says: "There is scarce any one thing which the ancient Canons of the church more **peremptorily* forbid than the admitting clergymen [*695. of one diocese to exercise their function in another, without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell show that the same was the known law of the English church, viz. that none should be admitted to officiate (not so much as a chaplain or curate) in any diocese in quâ non oriundus sive ordinatus non fuerit (as the latter expresses it), nisi deferat se cum literas ordinum suorum, atque literas commendatitias diœcesani sui." [WILLES, J.—Under this plea, you must show that letters testimonial were requisite both as to scientia and mores.] A form of literæ commendatitiæ is given in the Capitularia Regum Francorum, Vol. 2, p. 443 (edit. 1677), and also in the Decretals, and in a letter from Archbishop Tenison to his Suffragans, written in 1678, upon the improper practice of promiscuously granting letters testimonial. Palmes *v.* The Bishop of Peterborough, 1 Leon. 230, Cro. Eliz. 241, is relied upon as an express authority that letters testimonial are not necessary. It was, however, sufficient for the decision of that case to say that the bishop had demanded something which he was not entitled to demand. Besides, it does not appear by the record of that case that the clerk came from another diocese. [WILLES, J.—The case of the bishop who was going out riding, referred to by Mr. *Coleridge*, is to be found in the Year Book, 15 H. 7, fo. 6. The judges there refer to "letters of orders," but not to "letters testimonial" from the bishop.] Palmes *v.* The Bishop of Peterborough is observed upon in Watson's Incumbent 213.

The second and third objections are, that the bishop is not the sole judge of the sufficiency of the letters testimonial, that the plea should

*696] have disclosed some *specific matter of insufficiency, and that it contains no averment of a refusal on the part of the bishop to institute Mr. Reid. The plea is founded upon a neglect of the clerk to do something which he was lawfully required to do. The Canons already referred to require the clerk to bring with him when he comes for institution certain testimonials: the bishop adjudged the testimonials brought by Mr. Reid to be insufficient; and Mr. Reid went away, and did not return. The bishop therefore was entitled to collate by lapse. The same state of things arose in this case that occurred in the case in the Year Book, 15 H. 7, fo. 6, which is cited in 2 Leonard 5, and also in 3 Leonard 45. [ERLE, C. J.—There, the clerk presented himself to the bishop at an inconvenient time. The bishop was about to go out riding: the time was inconvenient, and the clerk was desired to come again, but neglected to do so; whereupon the bishop collated by lapse.] No reliance is placed upon that part of the plea which speaks of the attempt to commit simony. The plea would have been good without these averments: but, if true, they justify the bishop in the course he pursued in requiring further and better testimony. Minus sufficiens in literatura is a sufficient answer: The Bishop of Exeter *v.* Hele, Show. P. C. 88. The right of the bishop to examine is not contested,—see the Articuli Cleri, and Coke's commentary thereon, 1 Inst. 631,—subject perhaps to his judgment being reviewed by the archbishop.

Then it is said that the plea is bad for want of an averment of notice to the patron of the insufficiency of the letters testimonial. Notice to the patron, however, is only necessary where there is a refusal. Here there was none. As to whether notice is required in the case of a spiritual patron, there seems to be some diversity of opinion. It is not necessary to argue it; for, here, the clerk neglected to bring the sufficient *697] *testimony which the Canons require. The bishop did not refuse to admit. He insisted on his right to have letters testimonial, and they were never brought; and therefore he collated by lapse. An abbess, because she is supposed not to know whether the clerk presented by her is sufficiens in literatura, is to have notice: but a spiritual clerk, it seems, is not.

As to the replication,—the letters testimonial are set out, by whatever tribunal their sufficiency is to be ultimately determined. It is unnecessary again to refer to the books in which the forms of letters testimonial and letters dismissory are to be found,—Van Espen, Hostiensis, Devotus, the Decretals, &c., and also in a more modern work, Hodgson's Instructor, 8th edit., p. 53. If the sufficiency of the testimonial is for the court, they will hold this to be insufficient; if for a jury, there is an issue taken upon the plea, and it may be submitted to them. As to the latter part of the replication, to avail anything it should have disclosed something amounting to an estoppel. The question is, whether upon the whole pleadings the bishop is shown to be a disturber.

Coleridge, in reply.—The authorities show that the Canons have no authority whatever proprio vigore to control the decisions of the temporal courts, unless so far as they agree with the common law, or unless so far as they have received the sanction of parliament. In Westerton *v.* Liddell, Moore's Eccl. Cas. P. C. 160, Lord Kingsdown seems to think it more than doubtful whether they are of any authority at all. "It

was contended," he says, by Mr. Stephens, "in a very able argument, that the Canons passed in the reign of Henry the Eighth had no parliamentary authority in the reign of Edward the Sixth, for that the true meaning of the statutes relating to that subject passed in the reign of Henry *the Eighth is, that they provide for the review of the [*698 existing Canons by commissioners appointed by the King, and give authority to those Canons only in the mean time, *i. e.*, during the continuance of the commission; that the commissioners never made any report; that the commissions determined by the death of King Henry the Eighth; and that the parliamentary sanction given to the Canons ended at the same time. If it were necessary to determine this point, their Lordships (the judicial committee of the Privy Council) think this argument might deserve serious consideration, although it is contrary to the general impression which has prevailed upon the subject." It is conceded that the bishop is to be satisfied of the idoneity of the clerk presented to him for institution, and of that he is the sole judge. But it is submitted that Gibson is not borne out in saying that literæ commendatitiæ have anything to do with institution. [WILLES, J.—I have heard Lord Denman say that Gibson is of very questionable authority.(*a*)] It by no means follows that technical expressions had the same signification at the time that Dr. Gibson wrote that they have now: see the judgment of the Court of Queen's *Bench in Ma- [*699 son *v.* Lambert, 12 Q. B. 802. Among the constitutions of Stephen Langton, who was Archbishop of Canterbury in the time of King John, is one intituled "De idoneis præsentantibus ad vacanda beneficia," 2 Spelman's Concilia 157, which provides as follows,—"Præcipimus omnibus patronis ecclesiasticum, sive sint seculares personæ sive regulares; quod cum ecclesiasticum vacaverit beneficium de eorum donatione viros idoneos nobis præsentent, quibus morum honestos et literatura scientia suffraguntur; sequentes judicium rationis, non-affectum carnalitatis: alioquin pro officii nostri debito, de ecclesiis vacantibus, Deum habens præ oculis, ordinabimus." There is no recognition here of the right of one bishop to require from another literæ commendatitiæ, which, if any such existed, one might expect to find noticed by the archbishop.

The learned counsel referred at considerable length to the various

(*a*) The learned judge at a subsequent period of the argument referred to the case of Craven *v.* Sanderson, 7 Ad. & E. 880, 894 (E. C. L. R. vol. 34), 2 N. & P. 641, 653, where Lord Denman, speaking of Bishop Gibson, says,—"It is needless to observe that that writer is not to be considered as an authority." Mr. Justice Willes went on to say,—"Lord Denman, however, seems at a subsequent period to entertain more respect for the bishop; for, in delivering judgment in the case of The Queen *v.* The Archbishop of Canterbury, 12 Q. B. 483, 658 (E. C. L. R. vol. 64), which has been handed to me by Mr. Grant, he says.—'Bishop Gibson is a most remarkable authority in my opinion upon the subject [*i. e.* the power of the archbishop to inquire into objections as to the fitness of a bishop at the time of confirmation]. He was assailed by one of the most learned judges who ever sat in this court, Sir Michael Foster,(*b*) as one disposed to erect the Church into an imperium in imperio, a sacerdotal order which must in time absorb all the other powers in the state. Gibson wrote his invaluable treatise, the great storehouse of ecclesiastical law; and from that, copying more ancient works, we derive all the evidence in favour of this application. Yet neither in that work nor in the course of any proceedings taken by him does he assert the existence at any time of a power in the archbishop to defeat by such an inquiry as that suggested the nomination of the Crown."

(*b*) 1735. In a pamphlet intituled "An examination of the scheme of Church power laid down in the Codex," &c. See Dodson's Life of Sir Michael Foster, p. 13.

Canons cited on the part of the defendants, for the purpose of showing that the literæ commendatitiæ therein mentioned did not apply to clerks coming from another diocese for institution, and insisted that the case of Palmes *v.* The Bishop of Peterborough, 1 Leon. 230, Cro. Eliz. 241, was an authority expressly in point.

*700] *ERLE, C. J.—The court is much indebted to the learned counsel on both sides for the abundance of learning and industry they have displayed in arguing this case, and will take a little time for deliberation. *Cur. adv. vult.*

ERLE, C. J., delivered the judgment of the court:—

In this case there was a demurrer to a plea of the bishop in an action of Quare impedit. The plea alleges, that, after the living became vacant, the plaintiff presented Mr. Reid as his clerk to the bishop, and requested him to admit, institute, and induct Mr. Reid as the plaintiff's clerk; that Mr. Reid had not been ordained by the present or any former bishop of the diocese of Exeter; and at the time Mr. Reid was so presented he was a clerk in Holy Orders, and came from the diocese of Manchester, in which he had been then lately a minister of the Church of England, and had held a benefice and cure of souls, and that he was wholly unknown to the bishop (the present defendant); that Mr. Reid applied to the bishop to admit, institute, and induct him, but did not bring or produce from the Bishop of Manchester any sufficient testimony of his (the said Mr. Reid's) "honest conversation, ability, and conformity to the ecclesiastical laws of England," or any such testimony as he the said Bishop of Exeter was bound and ought by the laws of England to require and have from the Bishop of Manchester, but brought testimony from the said last-mentioned bishop which the Bishop of Exeter held to be and which was not sufficient testimony, according to the laws ecclesiastical, of his, Mr. Reid's, honest conversation, ability, and conformity to the ecclesiastical laws of England, or such testimony as the Bishop of Exe-

*701] ter was bound and ought to require and have and receive from the *Bishop of Manchester; that the Bishop of Exeter required further and sufficient testimony from the Bishop of Manchester,—of which Mr. Reid had notice from the Bishop of Exeter. The plea then averred that thereupon Mr. Reid departed and went away from the Bishop of Exeter, and never returned to him; and such further testimony from the Bishop of Manchester was never obtained, although a long space of time sufficient to obtain it, and to come again to the Bishop of Exeter, had elapsed before the collation afterwards mentioned. The plea then proceeds to say, that, after Mr. Reid went away from the bishop, he not only never received from Mr. Reid, or otherwise, any sufficient testimony from the Bishop of Manchester, or any other testimony whatever, of Mr. Reid's honest conversation, ability, and conformity to the ecclesiastical laws; but that, in fact, before the said collation, he received from the Bishop of Manchester, and otherwise, further testimony, from which he believed, and had good reason for believing, that Mr. Reid, while he had a cure of souls in the diocese of Manchester, had been guilty of an attempt to commit the offence of simony, by soliciting another clergyman (who is named in the plea) to enter into a simoniacal contract about another benefice held by Mr. Reid; and that Mr. Reid was not a person of honest conversation, or a person who conformed to the ecclesiastical laws, or a fit or proper person to be admitted to the

vacant living,—all which he well knew. The plea then concludes by stating, that, by reason of the premises, the Bishop of Exeter, after a lapse of six months from the living becoming vacant, collated the church to his own clerk, and put him into possession, as it was lawful of the said bishop to do.

The substance of this plea is, that, as Mr. Reid was a clerk coming from another diocese, the bishop had a right to demand from him before institution a *testimonial from the Bishop of Manchester, as the bishop of such other diocese; and that, as Mr. Reid failed [*702 to procure such testimonial within due time, the bishop collated his own clerk, by lapse. And the only question is, whether the bishop had a right to refuse to institute, on the ground that no such testimonial was produced. And we are of opinion that he had no such right, and that therefore the plea is bad.

It should be observed that the imputations in the plea against Mr. Reid in respect of the Bishop of Exeter having good reason to believe, from testimony received from the Bishop of Manchester, and otherwise, that Mr. Reid had been guilty of an attempt to commit simony, and that he was not a person of honest conversation, or fit or proper to be admitted to the vacant living, are not alleged substantively as causes for the bishop's refusal to institute; but are employed as mere illustrations and arguments in support of the allegation that Mr. Reid did not produce in due time a sufficient testimonial from the Bishop of Manchester. And, inasmuch, therefore, as these averments are not traversable, they might have been spared. If the bishop had a right to require such a testimonial from Mr. Reid, there is a sufficient allegation, without these averments, that it was not duly produced: consequently, a traverse of them would have been disallowed, as leading to an immaterial issue.

The bishop's assertion of this right, or rather duty, appears to be based on the 48th of the Canons of 1603, the words of which are adopted in his plea. Whether the authority of these Canons extends to such a matter as this, was one of the questions raised on the argument of this case, but one which it is unnecessary for us to decide, as, even admitting them to be binding either as prescriptions to the clergy or as declarations of the common law of the Church of England, we *should be of opinion, that, according to the true construction of [*703 them, no such right or duty is to be derived from their language as that on which the bishop relies in his plea.

The 48th Canon is, that "no curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction, in writing under his hand and seal, having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese into another, shall not be by any means admitted to serve without testimony of the bishop of the diocese or ordinary of the place as aforesaid whence they came, in writing, *of their honesty, ability, and conformity to the ecclesiastical laws of the Church of England.* Nor any shall serve more than one church or chapel upon one day, except that chapel be a member of the parish church or united thereto, and unless the said church or chapel where such a minister shall serve in two places be not able, in the judgment of the bishop or ordinary as aforesaid, to maintain a curate."

It appears to us that this Canon has no application to the institution of clerks to livings, but only to the service of cures and in churches and chapels by curates and ministers who are not the incumbents.

This Canon is headed "None to be curates but allowed by the bishop:" and it is preceded by the 47th Canon, which is headed "Absence of beneficed men to be supplied by curates that are allowed preachers," and by which it is ordained that "every beneficed man licensed by the laws of this realm upon urgent occasions of other service not to reside on his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it."

*704] *"The license to preach, to which this canon refers," says Sir John Nicholl, in Gates *v.* Chambers, 2 Add. Eccl. R. 192, "is a distinct thing from the license to a cure, which is the subject of the 48th Canon, being (the first) a license to preach specially, without which ministers were forbidden by the 49th Canon to expound, as it is termed, *i. e.* to preach, in their own cures or elsewhere, or to do any more than read plainly and aptly, and without glossing or adding, the homilies (then) already set forth or in future to be published by lawful authority." "It is well known," continues the learned judge, "that such separate licenses to preach were in use both before and for some time after the Reformation: but, for the last century or two, in consequence of the clergy being better educated, or for some other reason, they have fallen into desuetude and are now either included in letters of orders or in the licenses of ministers to particular cures."

Again, by the 46th Canon it is ordained that every beneficed man not allowed to be a preacher, shall procure sermons to be preached in his cure once in every month, if his living, in the judgment of the ordinary, will be able to bear it.

It appears, then, that the two Canons, immediately preceding the 48th, treat of services performed for beneficed men by curates and other ministers. And it should seem that these ordinances lead properly to the subject which we consider to be that of the 48th Canon, viz. the qualification of those who shall be permitted so to serve. Accordingly, in Watson's Clergyman's Law, Ch. 31, p. 376 (of the edition of 1712) this Canon and the 47th in conjunction with it are mentioned as the chief Canons which prescribe the qualification and duty of curates. So, in Rex *v.* The Archbishop of Canterbury and the Bishop of London, 15

*705] East 145, Lord Ellenborough speaks of the 48th Canon *as one of the Canons for the authority and duty of the bishop in respect of curates, regarding that authority and duty as standing on totally different grounds from the authority and duty of the bishop in respect of clerks presented to him for institution to a benefice, and which that learned judge considers in an earlier part of his judgment, speaking of the right to institution, as "a temporal inheritance where the patron is entitled to call upon the ordinary to institute his clerk, and to enforce that right by Quare impedit, unless the bishop specifically states in his plea some reasonable cause wherefore the clerk presented is not fit." Again, in Gates *v.* Chambers, above cited, Sir John Nicholl regarded the 48th Canon as plainly having for its object the qualification of curates who are engaged to take charge of parishes altogether or in part, though he doubted whether it applied to the case of one clergy-

man officiating out of his diocese, for the purpose of giving mere occasional assistance to another.

The Canon which really relates to the authority and duty of the bishop in respect of clerks presented to him for institution, is the 39th. It is headed "Cautions for Institution of Ministers into Benefices:" and it is in these words,—"No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it, and lastly, shall appear, upon due examination, to be worthy of his ministry."

There can be little doubt that the language of this Canon has reference to the case of Palmes *v.* The Bishop of Peterborough, 1 Leon. 230, Cro. Eliz. 241, which had occurred a few years before, and which, by some persons at least, had been regarded as having decided that the bishop had no right to require a *presentee for institution to show his letters of orders or to produce any testimonial. The [*706 object of the Canon appears to be to proclaim what the real rights and duties of the bishop are notwithstanding that decision.

Although the roll of that case has been searched, and we have been favoured with a copy of it, and although we have the two reports of it in Leonard and Croke, it is not easy to find on what ground the judgment proceeded, or whether what is reported to have fallen from the court was to any, and what, extent the ratio decidendi, or whether the case was decided on a mere point of pleading. The authority of the case, or at least of these judicial dicta, has been doubted by several respectable writers on ecclesiastical law. And it may be questioned whether the Canon now under consideration does not faithfully declare the common law of the Church, if it be construed as meaning that the presentee for institution must produce his letters of orders or give other satisfactory proof that he has obtained them, and also produce testimonials of his character, if the bishop requires them. With respect to this latter branch of the Canon, it is certainly very reasonable that the presentee, when a stranger to the bishop, should produce some testimonial of his former good life and behaviour. It appears from Hodgson's Instructions for the Clergy, 8th edit., p. 31, that, among the papers to be sent to the Bishop by the clergyman who is to be instituted, one should be a testimonial by three beneficed clergymen,—to be countersigned, if they are not beneficed in the bishop's diocese to whom the testimonial is given, by the bishop of the diocese in which *their* benefices respectively are situate,—that the presentee has been personally known to them for three years last past; that they have had opportunities of observing his conduct; that, during the whole of that time, they verily believe that he lived piously, soberly, *and honestly; and that they have not [*707 heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church of England; and ending with an expression of their belief that he is, as to his moral conduct, a person worthy to be admitted to the benefice. This is, in fact, the testimonial, totidem verbis, which the replication in the present case avers to have been produced by Mr. Reid to the bishop of Exeter.

We should be sorry to decide anything in this case which would tend to dispense with the necessity of producing some such testimonial, or

that would enable any one who is presented to a bishop for institution to refuse to comply with a requisition so long established and so reasonable, and which, in substance, is at all events prescribed to the clergy by this Canon. But neither the language of the Canon nor the general usage of the prelates, as far as we can learn, at least in modern times, makes it requisite that the presentee who comes from another diocese shall produce a testimonial *from the bishop of that diocese*,—still less a testimonial from him in the language of the Bishop of Exeter's plea and the 48th Canon "of honesty, ability, and conformity to the ecclesiastical laws."

All the authorities which were cited in the able and elaborate argument before us in support of such a proposition, appear to us, with one exception, to be, like that Canon itself, applicable only to the case of non-beneficed curates, and other ministers serving cures and churches and chapels of which they are not the incumbents, and not to the institution of clerks to benefices. That exception is, a passage in Gibson's Codex, p. 806, note (*c*), adopted in Burn's Ecclesiastical Law, tit. *Benefice*, § II.,—and which is in the following words:—"By the ancient law
*708] of the Church, and *particularly of the Church of England, the four things in which the bishop was to have full satisfaction, in order to institution, were, Ætas, scientia, mores, et ordo. And there is scarce any one thing which the ancient Canons of the Church more peremptorily forbid than the admitting clergymen of one diocese to exercise their functions in another, without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of Archbishop Walter and Archbishop Arundell show that the same was the known law of the English Church, viz. that none should be allowed to officiate (not so much as a chaplain or curate) in any diocese, in qua oriundus sive ordinatus non fuerit, nisi deferat secum literas commendatitias diocesani sui. If, then, this is the common as well as the canon law of the Church of England, and it is not contradicted by any statute, and is a thing most reasonable in itself, the judgment in the Court of K. B. 33 Eliz. (Palmes *v.* The Bishop of Peterborough), that the clerk is not bound to show his letters of orders or missive to the bishop, and that his not showing them is no good cause to stay his admittance, does certainly deserve a second consideration."

It may be observed that the constitutions of the two archbishops here cited and relied on, as to the officiating by any one in a diocese "in qua oriundus non fuerit," point at a qualification not to be found in the Canons of 1603, and which can hardly be regarded by any one at this day as part of the existing common or canon law. The circumstance of a man having been *born* in any particular diocese would surely not be allowed now to make any difference as to his qualification for officiating there, whatever may have been the case in the earlier times of the Church: and it may be remarked that the bishop's plea in the present
*709] case abandons this part of the supposed common law of the *Church; for, though it negatives Mr. Reid's having been *ordained* in the diocese of Exeter, it does not aver that he was not *born* there.

It is further to be considered how far this supposed law of the English Church is consistent with the established doctrines of the common law of the land.

Now, it is said by Lord Coke, 2 Inst. 631, that, in a Quare impedit

brought against the bishop for refusal of the clerk, the bishop must show the cause of his refusal specially and directly; for, whether the cause thereof be spiritual or temporal, the examination of the bishop concludes not the plaintiff: and, if the cause be temporal, and sufficient in law (which the court must decide), the same may be traversed, and an issue thereon joined, and tried by the country. The law thus laid down has never been doubted, but it has been regarded as indisputable by all subsequent authorities: see Watson's Clergyman's Law, Ch. 26, pp. 497, 498 (edition of 1712), Comyns's Digest, tit. *Eglise* (I.), 1 Burn's Ecclesiastical Law 163, tit. *Benefice*, §. 3, 1 Bla. Comm. 390.

If, however, it be a good cause of refusal that the bishop of the diocese from which the clerk comes will not furnish him with a testimonial to the bishop to whom the clerk is presented, it is obvious, that, in such a case, this right of the patron to have the cause explicitly stated why his clerk was refused institution, is frustrated. The bishop who declines to give the testimonial must be supposed to be influenced in so doing by his belief that the clerk is unworthy of the benefice to which he is presented, either by reason of want of ability, or by reason of some misconduct. Now, if the bishop declines to give his testimonial on the former ground, it is plain that he is prejudging, without appeal, a question which it is the duty of the bishop to whom the clerk is presented to decide upon his own *examination. If the testimonial is refused on the latter ground, it is equally plain that this absolute [*710 refusal has the effect of debarring the court of the right to decide whether the surmised misconduct constitutes a sufficient ground of refusal, and the patron of the right to have the truth of the alleged misconduct tried by the country. In other words, the doctrine laid down by Lord Coke must be qualified, by adding to it, that it is inapplicable to a case where the clerk comes from another diocese, unless he was originally ordained in that in which the living is situate. We can find no authority whatever for such a qualification of the law of the land; and we do not think it is called for by any principle of good sense or justice.

On these grounds, we are of opinion that the right or duty which is the foundation of the plea, has no legal existence, and that, consequently, the plea is bad.

We wish it to be understood that nothing which has fallen from the court is meant to throw any doubt on the doctrine laid down by Lord Hardwicke in Middleton *v.* Croft, 2 Stra., 2 Atk. 659, that the Canons of 1603 do not bind the laity proprio vigore, *i. e.* by their own force and authority, though there are many provisions contained in them which are declaratory of the ancient usage and law of the Church received and allowed here, which, in that respect, and by virtue of such ancient allowance, will bind the laity. How far they are to govern such a case as this, by reason of their binding the clergy, is a question which, for the reasons above given, it is unnecessary to decide. But we think it right to say that it seems to us very difficult to maintain that they can in any case be binding on patrons of livings seeking to enforce their common law rights. Judgment for the plaintiff.

*711] *HOPKINS v. THOMAS. *Jan.* 31.

Bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a schoolmaster for board and tuition of the bankrupt's son under a quarterly contract,—the demand not being a *debt* "not payable at the time of the bankruptcy," within s. 172 of the 12 & 13 Vict. c. 106, or "a liability to pay money upon a contingency," within s. 178.

THIS was an action to recover the amount of a schoolmaster's bill. The cause was tried in the Mayor's Court, London, before the Common Serjeant, the declaration being in the usual form of a concessit solvere. By his particulars the plaintiff claimed 37*l.* 0*s.* 7*d.*, for five quarters' tuition and board of the defendant's son, from Michaelmas, 1857, to Christmas, 1858.

As to 12*l.* 4*s.* 8*d.*, the defendant pleaded a tender, and paid that sum into court, and as to 8*l.* 17*s.* 9*d.* he pleaded his bankruptcy and certificate.

The only question at the trial was as to this latter sum,—the contract being proved to be a quarterly contract, and the sum tendered being enough to satisfy the plaintiff's claim from Midsummer to Christmas, 1858, and the defendant's certificate being admitted to be a bar to the plaintiff's claim up to Christmas, 1857.

It appeared that the petition upon which the defendant was adjudicated bankrupt was filed on the 19th of March, 1858, and that he obtained his certificate on the 29th of July: and it was contended on the part of the defendant that his liability to pay for the quarter ending on the 25th of March, 1858, was a liability to pay money upon a contingency, for which the plaintiff might have proved under the fiat, and therefore that the certificate was a bar.

For the plaintiff it was insisted that there was no debt due until the end of the quarter, and consequently that the certificate was no bar to that portion of the demand.

The Common Serjeant directed a verdict to be entered for the defend-
*712] ant, reserving leave to the plaintiff *to move to enter a verdict for him for 8*l.* 17*s.* 9*d.*, if the court should be of opinion that the plaintiff's claim quoad that sum was not barred by the certificate.

Henry James, in Michaelmas Term last, obtained a rule nisi accordingly.

Robinson, on a subsequent day in the same term, showed cause.—The sum in question was a *debt* provable under the 172d section of the 12 & 13 Vict. c. 106, which enacts "that any person who shall have given credit to the bankrupt upon valuable consideration for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security, or not, shall be entitled to prove such debt, bill, bond, note, or other security as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of 5*l.* per centum per annum, to be computed from the declaration of a dividend to the time such debt became payable according to the terms upon which it was contracted,"—or it was a *contingent liability* within the 178th section, which enacts, "that, if any trader who shall become bankrupt

after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as *the court shall think fit; and, after the contingency shall have happened, and the demand in respect of such liability shall have [*713 been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends; provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed: provided also, that, where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees, at any time after the expiration of such time, and if the court shall think fit, be expunged either in whole or in part from the proceedings." This was a debt contracted before, but not payable until after the bankruptcy: but it is a debt which must be paid, and one which is susceptible of valuation. [WILLIAMS, J.—Suppose the pupil were withdrawn from the school or died in the middle of a quarter, would the whole quarter be payable?] No doubt. In Parslow *v.* Dearlove, 4 East 438,—where it was held that school-money for the education, &c., of the defendant's son, payable half-yearly, was not a *debt due* till the end of the half-year, so as to be provable under a commission of bankrupt against the parent, who became bankrupt a few days before the end of the half-year, though he had just before his bankruptcy taken his son home *for the holidays;* the contract not being thereby put an end to; and consequently that the bankrupt's certificate under the 5 G. 2, c. 30, was no bar to an action against him for the half-year's education, &c.,—the decision proceeded upon the ground that the 31st section of the statute was confined to *written* securities. If not a *debt due within the 172d section, [*714 this clearly was a sum payable upon a contingency within the 178th section of the existing Bankrupt Act. The death of either master or pupil, or the removal of the latter, would be a contingency. The case of Warburg *v.* Tucker, 5 Ellis & B. 384 (E. C. L. R. vol. 85), was decided upon its own special circumstances.(*a*) [WILLIAMS, J.—In The South Staffordshire Railway Company *v.* Burnside, 5 Exch. 129,† 6 Railway Cases 611, the defendant, a railway shareholder, became bankrupt on the 8th of February, 1848: on the 18th of the same month a call was made, and three other calls were subsequently made: on the 24th of April, the defendant obtained his certificate: the assignee not having accepted the shares,—it was held, that, the property in them continuing in the bankrupt, the claim was not barred by his certificate, inasmuch as it was not provable as a debt due in future under the 51st section of the 6 G. 4, c. 16, or as a debt payable on a contingency within the meaning of the 56th section.] Non constat that any call would be

(*a*) And see the decision in the court of error in a second action between the same parties in respect of subsequent premiums, 1 Ellis, B. & Ellis 914 (E. C. L. R. vol. 96).

made there. [WILLIAMS, J.—Non constat that the schoolmaster or the pupil will die during a quarter.] The 178th section contemplates two species of contingency,—one, the happening of a certain event, there being no existing debt until the event happens,—the other, the case of a debt existing, but liable to be defeated by the happening of a contingency: the former is not within the section, the latter is. Here, the only contingency that could arise, is one which would defeat the claim. It is difficult to see what description of claim can satisfy the words of the 178th section, if this does not. [WILLIAMS, J.—Servants' wages.] There is a special provision in the act for those: 12 & 13 Vict. c. 106, *715] *s. 168. A liability on a guarantee is susceptible of valuation and proof,—Ex parte Downman, 2 Glyn & J. 241; In re Willis, 4 Exch. 530.† There is no greater difficulty in ascertaining the value of the liability here than there is in the case of a guarantee. [ERLE, C. J.—What is a liability to pay money which is not a debt? WILLIAMS, J.—Under the 56th section of the 6 G. 4, c. 16, which corresponds with the 177th section of the present act, to constitute a contingency, the bankrupt must have contracted a debt before his bankruptcy: the object of the 178th section was, to extend the former provisions to cases of contingent liability where there was no existing debt.]

H. James, in support of his rule.—To satisfy the words of the 172d section, there must be a debt absolutely due, payable at a future day. To call this a present debt, it must be contended that the whole quarter was a debt due on the 1st of January. [ERLE, C. J.—You need not waste your strength on that section.] Boyd *v.* Robins, 5 C. B. N. S. 597 (E. C. L. R. vol. 94), is almost identical with this case. In July, 1850, A. and B. gave C. a guarantee (continuing) for 200*l.*, for goods to be supplied to D., with a stipulation that the security should subsist "until C. received a notice in writing to the contrary:" goods were supplied to D. upon the faith of this guarantee, and a balance exceeding 200*l.* was due in respect thereof: in June, 1853, B. became bankrupt, and duly obtained his certificate: and it was held by the Exchequer Chamber,—reversing the judgment of this court, 4 C. B. N. S. 749,—that B.'s liability upon this guarantee was not a "contingent liability" within the 178th section, and consequently that his certificate was no bar to a claim in respect of goods supplied to D. after the bankruptcy of B. There is no contingency here. The death of one of the *716] *parties during a quarter is not the sort of contingency which the statute contemplated. The contingency must be in the contract itself, and not a contingency of life or death. If the pupil were taken away during the quarter, perhaps the whole quarter would become due: but, upon the facts here, nothing was *due* in respect of the current quarter until after the bankruptcy. In Thomas *v.* Williams, 1 Ad. & E. 685 (E. C. L. R. vol. 28), 3 N. & M. 545, it was held, that, if a clerk, being hired for a year, continue in his master's office after his bankruptcy, and then in the middle of the year, by mutual consent, the contract is rescinded, upon an understanding that the clerk is to be paid rateably for his services during the current year, the clerk is not barred by the certificate from recovering all the wages due from the expiration of the year last before the commission up to the time of rescinding,—no part of such wages being provable under the commission. [WILLIAMS, J.—This matter was a good deal considered in Maples, app., Pepper,

resp., 18 C. B. 177 (E. C. L. R. vol. 86). Ten years ago A. let to B., as tenant from year to year, premises adjoining other premises occupied by B. About seven years ago, A. permitted B. to make a communication through the party-wall, and to make other alterations, upon condition that B. should, at the termination of his tenancy, restore the premises to their original state. In April, 1855, B. became bankrupt; and, on the 17th of May, B. gave notice to A. that he would deliver up possession of the premises, under the 12 & 13 Vict. c. 106, s. 145, the assignees having declined to take them: and it was held that the "damages resulting from the non-compliance with the condition upon which the permission to alter was given," did not constitute a "liability to pay money upon a contingency," within s. 178; and that the condition or agreement above specified, to restore the premises to their *previous state was not a condition or agreement within s. 145. [*717
My Brother Willes there says,—"It is true that the defendant, if he failed to perform his agreement, might be liable to pay money in the shape of damages. But, is that a liability to pay money upon a contingency? Certainly not. It is not a liability to pay money until it results in damages; and then it is a liability to pay money absolutely, and not upon any contingency."] The decision there turned upon the absolute impossibility of proving the amount of repairs which would be necessary to be done at the end of the term. At all events, there could be no proof here in respect of the six days between the 19th and the 25th of March. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—(*a*)

In this case the question was whether the plaintiff's claim was barred by the defendant's certificate. The facts were, that the defendant's son had been placed at the plaintiff's school, and had continued there during the quarter ending on the 25th of March, 1858. By the terms of the contract the payment for that quarter was not due until the quarter-day. On the 19th of March, the petition for adjudication in bankruptcy was filed under which the certificate was obtained. The defendant contended that the liability to pay on the 25th of March, 1858, if the son continued at the school to that day, was "a liability to pay money on a contingency" within the 178th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, and that the plaintiff might have proved under the fiat for his demand, and so the certificate was a bar. But we are *of the contrary opinion. Until the 25th of March, [*718
no debt was due. On the 19th of March the contract was not put an end to by the bankruptcy: and, if the plaintiff had sent the son away from the school, he would not have had a right to recover for the portion of the quarter then elapsed. Where a plaintiff had contracted to serve a defendant as clerk, for wages payable yearly, and during the service the defendant became bankrupt, and the plaintiff continued in the service afterwards, and then the contract was dissolved by mutual consent, it was decided that the contract was not put an end to by the bankruptcy; that, at the date of the bankruptcy, nothing was due for the current year; that therefore the plaintiff could not recover for his service during the year up to the time of the dissolution of the contract, as well before as after the bankruptcy; and that the certificate was no

(*a*) The judges present at the argument were, Erle, C. J., Williams, J., Crowder, J., and Willes, J.

bar,—Thomas *v.* Williams, 1 Ad. & E. 685 (E. C. L. R. vol. 28), 3 N. & M. 545. It is clear, that, in the present case, there was no debt payable in future, or on a contingency, at the time of the defendant's bankruptcy: and we are of opinion that there was no liability within the meaning of the 178th section, though there was a contract to pay if the contract was continued until that day. No case was cited showing that the 178th section had ever been held applicable in such a case: and, although the section has undergone much discussion in all the courts, no judicial opinion has been found which supports the defendant's case. Our judgment, therefore, is for the plaintiff. Rule absolute.

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*719] *STUBBS *v.* TWYNAM and Another. *July* 8, 1859.

The trade-assignee under a fiat in bankruptcy is not personally liable to the messenger for work done in his time, unless there is either an express contract or an express employment of the messenger by the trade-assignee.

THIS was an action by a messenger of the Court of Bankruptcy against trade-assignees under a fiat against one Webb, for fees and expenses necessarily incurred by the plaintiff in the execution of his duty.

The particulars endorsed on the writ were as follows:—"36*l.* 3*s.* 3*d.*, the amount of plaintiff's taxed bill of costs as messenger of Her Majesty's Court of Bankruptcy, in the matter of Edmund Webb, a bankrupt. The full particulars have already been delivered. The plaintiff claims the like amount for work, labour, and materials, and for money paid, and upon accounts stated."

The declaration was in the common form: the defendants pleaded never indebted.

The cause was tried before Williams, J., at the first sitting in London in Easter Term, 1859. The plaintiff having given his evidence, the learned judge asked the plaintiff's counsel whether he was in a condition to prove a special contract on the part of the defendants to pay the plaintiff his charges; whereupon the plaintiff's counsel stated that he was prepared to prove that the defendants had continually given to the plaintiff directions as to the course he was to pursue and the property he was to seize. Ultimately the following admissions were made between the counsel:—

"That the plaintiff had acted as messenger under the direction of the defendants as trade-assignees, but they (the defendants) only did what was requisite and proper in discharge of their duty; that the defendants had paid over all the moneys they had received (78*l.*) to the official assignee; and that there were no assets in the hands of the official
*720] assignee at the *commencement of this suit, beyond what was sufficient to pay the petitioning creditor's costs,—17*l.* 8*s.* 6*d.* only being in hand."

The learned judge thereupon observed that the question resolved itself into one of law, and he directed a verdict for the plaintiff, reserving leave to the defendants to move to enter a nonsuit, if the court should be of opinion that there was no evidence to go to a jury in support of the plaintiff's claim.

Manisty, Q. C., in Easter Term, 1859, accordingly obtained a rule nisi to enter a nonsuit, contending, upon the authority of Hamber *v.* Hall, 10 C. B. 780 (E. C. L. R. vol. 70), that the trade-assignees, who, under the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, were precluded from the possession of any part of the bankrupt's estate, were not liable for the messenger's expenses, in the absence of any express contract. [WILLES, J., referred to Robson *v.* Jonassohn, 8 Scott N. R. 35, 7 M. & G. 351 (E. C. L. R. vol. 49).]

Skinner, Q. C., and *Henry James*, in Trinity Term, showed cause.—The case of Hamber *v.* Hall, 10 C. B. 780 (E. C. L. R. vol. 70),—which arose under the insolvent debtors acts, 5 & 6 Vict. c. 116, s. 1, and 7 & 8 Vict. c. 96, s. 4,—is said to have decided that the trade-assignee of the petitioner is not personally liable for the messenger's fees and expenses, *in the absence of an express contract.* But the judgment shows that that is not quite accurate, but that he may be liable upon a contract to be implied from his acts and conduct. In that case there was no interference whatever on the part of the trade-assignee: here the defendant *did* interfere. [BYLES, J.—The rule is well stated by Jervis, C. J., in that case. The costs of prosecuting the petition are cast upon the petitioning creditor in the first instance: beyond that, *the statute seems to make no special provision.] The moment the [*721 trade-assignees are appointed, they have the sole control over the bankrupt's estate. They are obliged to pay every one else: why not the messenger? [ERLE, C. J.—Do you say that the trade-assignees are bound to pay out of their own pockets, where the estate yields no funds?] Yes. The messenger has no official duty after the appointment of the trade-assignees. By the 23d section of the 17 & 18 Vict. c. 119, it is provided, that, "after the appointment of an official assignee to act in any bankruptcy, and before the choice of assignees by the creditors, the messenger shall follow the instructions of the official assignee, subject to the directions and control of the court, with respect to the taking possession of any part of the defendant's estate or effects of which the messenger shall not have then already taken possession, and the keeping possession of any part thereof of which he shall then already have taken or shall at any time thereafter take possession." [ERLE, C. J.—Not a word as to who shall pay him.] In Robson *v.* Jonassohn, 8 Scott N. R. 35, 7 M. & G. 351 (E. C. L. R. vol. 49), it was held that the assignees are not bound to continue the services of a messenger appointed by the commissioner: Tindal, C. J., saying,—"The law having vested in the assignees the property in the goods, it would be singular indeed if they had not authority to appoint a person in whom they could have confidence to take care of them." In Hamber *v.* Purser, 2 C. & M. 209,† in an action by a messenger against the sole assignee of a commission of bankrupt under the 6 G. 4, c. 16, for the costs of advertising a meeting of creditors, and for the hire of the room in which the meeting was held,—it was held that it was not necessary for him to prove an employment by the assignee, nor any *express* recognition of him as messenger, as the fact of his having acted as *messenger, and of the expenses being incurred, must have been [*722 known to the assignee. Lord Lyndhurst, C. B., there says,—"The assignee must have been cognisant of what was done by the plaintiff as messenger; and the taxation shows that these expenses were properly

incurred." Bayley, J., says,—"The assignee is liable for costs necessarily incurred; and the acts in respect of which the plaintiff claims must of necessity have been done. They must also have been within the knowledge of the assignee; and, if he did not prohibit the messenger from incurring them, he is liable." And Gurney, B., adds,—"These were necessary expenses, and the assignee must have known of them." [WILLES, J.—That was under the old system, where the trade-assignees had the sole control and disposal of the bankrupt's estate. BYLES, J.—What implied contract do you rely on here?] In Hamber *v.* Purser, the mere not restraining the messenger,—the acquiescence in his beneficial exertions,—was held to be enough to raise an implied contract on the part of the assignee to pay him. Here, the admissions show something more; they show that the messenger acted under the direction of the defendants, and that money came to their hands more than sufficient to pay the messenger's demand. [WILLES, J.—In Ex parte Hartop, 9 Ves. 109, assignees were ordered to reimburse the messenger the expenses incurred by him *subsequently* to the choice of assignees.] Burwood *v.* Felton, 3 B. & C. 43 (E. C. L. R. vol. 10), 4 D. & R. 621 (E. C. L. R. vol. 16), decided that the assignee is not liable to the messenger for fees due to him *before* the choice of assignees. The official assignee is protected from liability by s. 41. [ERLE, C. J.—Before the institution of official assignees, the Court of Bankruptcy exercised its functions through the messenger. When the trade-assignees *723] are chosen, that portion of the court's duty ceases. There is no *necessity for a messenger, except to take possession of the bankrupt's estate in aid of the assignees.] The trade-assignees are mere trustees for the creditors. The 150th, 151st, 152d, and 153d sections point out the things as to which the trade-assignee must receive the directions of the court. Except as to these, the trade-assignees are altogether uncontrolled. For all that is material here, there is no difference between the provisions of the statute upon which the case of Hamber *v.* Purser was decided (6 G. 4, c. 16), and that now in force. [WILLES, J.—Having an admission of an employment of the messenger by the trade-assignees, you need not rely upon Hamber *v.* Purser; nor need you distinguish Hamber *v* Hall.] It is quite immaterial in whom the property is vested. The messenger having been employed by the defendants, the expenses in question having been properly and necessarily incurred, and the messenger being without remedy against any one else, it is submitted the action is properly brought against the trade-assignees.

Manisty, Q. C., and *Garth*, in support of the rule.—The appointment of the messenger and the seizure of the property by him took place before the appointment of the defendants as trade-assignees. The messenger, unless removed, continues to exercise his functions throughout the whole of the proceedings. [ERLE, C. J.—In practice, no doubt, it is usual for the assignees to continue the services of the messenger. But they may, it seems, remove him and put another person in his place: Robson *v.* Jonassohn, 8 Scott N. R. 35, 7 M. & G. 351 (E. C. L. R. vol. 49). If the trade-assignees remove the messenger, and appoint a person of their own selection, they must pay him. If so, I do not see why they should not pay the messenger originally appointed, if they

avail themselves of his subsequent services. The *messenger is the officer of the court up to the appointment of assignees. But, [*724 when there is some one in whom the estate vests, is not the messenger there in the character of servant to the owner of the estate?] That would apply to the official assignee, in whom the property vests until the appointment of the trade-assignees. There is no difference between the official and the trade-assignees, except that the former holds the purse. Unless the court is prepared to say that Hamber *v.* Hall is not law, the defendant cannot be held liable in this case. There, there was a direct notice to the trade-assignee that the messenger would look to him for payment; and, although he still allowed the messenger to continue to act, he was held not to be personally liable. [WILLES, J.—In that case, Cresswell, J., assumes that nothing was done by the messenger under the authority of the trade-assignee. Here, the trade assignees knew of and assented to all that had been done by the messenger. That is the distinction between the two cases.] By the 134th of the bankruptcy rules,—Arch. B. L. 619,—the official assignee may require the trade-assignees to pay into the Bank of England every farthing they receive. The trade-assignee is but the creature of the court. [WILLES, J.—He is the representative of the body of creditors, for whom the messenger acts.] If the defendants as assignees did no more than their duty, they are, upon the authority of Hamber *v.* Hall, absolved from all responsibility. In a case of Cooper *v.* Headley and Greenacre, Guildhall Sittings after Hilary Term, 1857, where a similar action was brought, the Lord Chief Baron nonsuited the plaintiff on the ground that no special contract on the part of the trade-assignees to pay the messenger's expenses was proved; and, although there was evidence that one of the assignees knew of the fact of the plaintiff's man having carried *on the bankrupt's business (a brewery) for the benefit of the estate, and that he sanctioned it, inasmuch as the supply [*725 of malt for the purpose had been obtained from him, his Lordship refused to allow the record to be amended by striking out the name of the other defendant.

ERLE, C. J.—This case involves a question of considerable public importance in the administration of the bankrupt laws, and therefore we will take time to consider our judgment. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:—

We are of opinion that the rule in this case must be discharged.

It appears from the case of Hamber *v.* Purser, 2 C. & M. 209,† that, before the institution of official assignees, the mere knowledge on the part of the *trade*-assignees that the messenger was employed for the benefit of the estate after their appointment, would be sufficient evidence of an implied promise by them to pay him.

But, since the custody and possession of the bankrupt's estate has been vested in the *official* assignees, the mere relative position of trade-assignees and messenger will no longer suffice to create a liability in the trade-assignees, without an express promise to pay, or an express employment of the messenger; for, the messenger, in receiving the property, and taking care of it, primâ facie represents the official assignee. So this court held in Hamber *v.* Hall, 10 C. B. 780 (E. C. L. R. vol. 70). But in that case the marginal note goes beyond the judgment. The effect of the judgment of the court is, that the trade-assignee is not

*726] liable to the messenger for *work done in the time of the trade-assignee, unless there were either an express contract or an express employment by the trade-assignee.

There was here evidence to go to the jury of an express employment of the plaintiff by the defendants, and therefore the rule must be discharged. Rule discharged.(*a*)

(*a*) See Burwood *v.* Kant, 2 C. & P. 123 (E. C. L. R. vol. 12), Ex parte Burwood, 2 Glyn & J. 70.

WARNE *v.* HILL. *Jan.* 30.

A cause being called on at the Assizes, the plaintiff, in consequence of some misapprehension on his part as to the order in which the judge had proposed to take the list, was absent: the defendant was present with his counsel, and, after some delay, a nonsuit was entered. It being subsequently discovered that the jury had not been sworn, the judge (the defendant having gone away) directed that the entry of the nonsuit should be expunged, and the cause struck out. Upon an application by the defendant for the costs of the day, the court,—thinking that both parties were in default,—directed that the costs of the day and of the motion should be costs in the cause.

THIS was an action against an attorney for alleged negligence. The cause was entered for trial at the last Summer Assizes at Croydon, and was called on at the sitting of the court at 9 o'clock on the morning of the 18th of August: but, in consequence of some misunderstanding as to the judge's arrangement of the course of business, neither the plaintiff nor his counsel or attorney or witnesses appeared. The defendant was present with his counsel. After waiting a few minutes, and the plaintiff not appearing, the learned judge directed a nonsuit to be entered, which was accordingly done. The defendant with his witnesses then left the court, and returned to town.

Shortly afterwards the plaintiff came into court, when it was for the first time discovered that the jury had not been sworn. The judge *727] thereupon, after some *delay, to give the defendant a chance of appearing, ordered, that, instead of a nonsuit, the cause should be struck out.

The defendant claimed, under these circumstances, to be entitled to the costs of the day; but the master declined to tax them without the order of the court.

Parry, Serjt., on a former day in this term, obtained a rule calling upon the plaintiff to show cause why the master should not be at liberty to tax and allow the defendant his costs of the day. He referred to Archbold's Practice, 10th edit. pp. 1399, 1424.

Prentice and *Pearce* now showed cause.—The defendant is not entitled to any costs. He ought to have taken care that the jury were sworn. Sleeman *v.* The Copper Miners of England, 5 D. & L. 151, shows that the court has a discretion with regard to these costs; and, the defendant himself being in fault here in not seeing that the jury were sworn before asking for a nonsuit, the court will not exercise its discretion in his favour. In Pope *v.* Fleming, 5 Exch. 249,† a plaintiff having entered his cause on the commission day for trial at the Assizes, on the following day caused it to be called on out of its turn, in order that a witness might be called on his subpœna: that was accordingly done, and, the

witness not appearing, the plaintiff withdrew the record, having been told by the judge's clerk that he might re-enter it before 12 o'clock: the defendant then delivered a ne recipiatur, on the ground that a record could not be entered after the sitting of the court; and the judge so ruled: the witness afterwards came into court, and the plaintiff then offered to try, or that the cause should stand at the bottom of the list, but the defendant refused: it was held that the defendant was not entitled to the costs of the day, *since it was through his own default [*728
that the cause was not tried.

Parry, Serjt., and *Murray*, were called upon to support the rule.—The question is, who was in default on the morning of the 18th of August, the plaintiff or the defendant. The defendant having got a rule under the 99th section of the Common Law Procedure Act, 1852,(*a*) the master declined to tax his costs, but referred the matter to the court. [WILLES, J.—The 99th section does nothing more than alter the form of the rule.] In Allott *v.* Bearcroft, 4 D. & L. 327, it was held that a defendant is entitled to move for judgment as in a case of a nonsuit,—for which this proceeding is a substitute,—although the cause, on being called on for trial, was struck out of the list in consequence of neither plaintiff nor defendant appearing. Parke, B., there said: "The plaintiff has not proceeded to trial according to the course and practice of the court, but has been guilty of default; and the defendant might either have instructed counsel to appear and have the plaintiff called, or he might, as he has done, apply to this court for judgment as in case of a nonsuit. The affidavit, however, discloses a sufficient excuse to induce us to discharge the rule on a peremptory undertaking. *If the defendant can show by affidavit that any costs of the day have been incurred in consequence of the default, he ought to have them.*" [WILLIAMS, J.—Morgan *v.* Fernyhough, 11 Exch. 205,† rather shakes that case. It was there held that a defendant is not entitled to the costs of the day for not proceeding to trial pursuant to notice, where no one appeared on his *behalf when the case was called on. Pollock, [*729
C. B., in giving judgment, says: "A case was cited by the defendant's counsel of Allott *v.* Bearcroft, on which I remarked during the argument that the question whether the party was entitled to costs was not then before the court: and what the learned judge is reported to have said, namely, that, if the defendant could show that any costs of the day have been incurred in consequence of that default, he ought to have them, could hardly be taken to have reference to a case in which the default was one in which the defendant himself participated."] In Powell *v.* James, 12 M. & W. 100,† it was held to be sufficient for the affidavit on a rule for costs of the day for not proceeding to trial, to show a default in not proceeding to trial, pursuant to notice, and not countermanding in due time, and that it need not show that costs have actually been incurred by the defendant. The present case is distinguishable from Morgan *v.* Fernyhough, because here the defendant was ready to try, and all the expenses of a trial had been incurred.

ERLE, C. J.—I am of opinion that this rule should be discharged. I think there is no strict right in the defendant to the costs he claims,

(*a*) Which enacts that "a rule for costs of the day for not proceeding to trial pursuant to notice, or not countermanding in sufficient time, may be drawn up on affidavit, without motion."

but that the matter is entirely in our discretion. It is contended that the defendant ought to be in the same position as if he had obtained a nonsuit. But he has not got a nonsuit; and his failure arises from his own neglect to see that the jury were properly sworn. I do not find that any blame is attributable to either of the parties: the plaintiff's absence was owing to a misapprehension of what the judge had said on the previous day as to the course of business. There was some degree
*730] of default on both sides; and I think the justice of the case will *be met by discharging this rule, and directing that the costs of the day and of this rule should be costs in the cause.

WILLIAMS, J.—I am entirely of the same opinion. I think the law was correctly stated by Parke, B., in Allott *v.* Bearcroft, 4 D. & L. 327; and I think there is nothing in the decision in Morgan *v.* Fernyhough, 11 Exch. 205,†—where it was held that a defendant cannot come to the court and ask for costs which result from his own neglect,—to shake that dictum. Taking, then, the law to be as laid down by Parke, B., in Allott *v.* Bearcroft, the plaintiff in this case failing to appear when the cause was called on, it was competent to the defendant to pursue one of two courses: either he might have got the cause struck out, and then come to the court and asked for costs of the day, or he might have insisted upon a nonsuit. If he adopted the latter course it was incumbent on him to see that all things were regular. Here the defendant was not in a situation to ask for a nonsuit, because the jury were not sworn. I therefore think that the observation of Pollock, C. B., in Morgan *v.* Fernyhough applies here, viz. that, if the defendant had exercised due care in the matter, the costs of the day would not have been thrown away, but that the defendant might have had a nonsuit entered, with the usual consequences attendant thereon. On the other hand, it is impossible not to see that the plaintiff was also in default. Although he swears that he understood the learned judge to have intimated on the previous day that he would not take common jury causes on the morrow, I think he must have laboured under some misapprehension as to what passed; for, if any such announcement had been made, the learned judge would not have adopted the course he did. Both
*731] parties, therefore, being in some *degree in fault, I think justice will be done by discharging this rule upon the terms mentioned by my Lord.

WILLES, J., and KEATING, J., concurring,

Rule discharged accordingly.

GEORGE COLLINS HOUNSELL, an Infant, by HERBERT EUSTACE HOUNSELL, his next Friend, *v.* SIR JOHN HENRY GREVILLE SMYTH, Bart., and Others. *Feb.* 1.

An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance.

A declaration stated that the defendants were seised of certain waste land upon which was a quarry that was worked by a certain person subject to the payment of certain royalties to the defendants; that the waste land upon which the quarry was situate was unenclosed and open to the public, *and that all persons having occasion to pass over the waste had been used*

and accustomed to go upon and across the same without interruption or hindrance from and with the license and permission of the owners of the waste; that the quarry was situate near to and between two public highways leading over the waste, and was precipitous, &c., and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one of such roads to the other beside or near the quarry; that the defendants, knowing the premises, negligently and contrary to their duty left the quarry unfenced, and took no care and used no means for protecting the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry; and that the plaintiff, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken the wrong road, was crossing the waste for the purpose of getting into the other, and, not being aware of the existence or locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in and was injured:—Held, that the declaration disclosed no legal ground of complaint.

THE declaration stated, that, before the time of committing the grievance thereinafter mentioned, the defendants were seised in their demesne as of fee, as tenants in common, and possessed of certain waste land, parcel of the manor of Henbury, in the county of Gloucester, and that, long before the time of committing the said grievance, a quarry had been and was opened upon and within the said land for the getting of stone, which quarry, before and at the time aforesaid, was being actually worked by a certain person with the license and permission of the defendants, and *upon the terms of payment to the defendants of certain rents and royalties for the license and privilege [*732 of working the same, and of getting and taking away the stone thereof: That the said waste land upon and within which the said quarry was and is situate, was and is wholly unenclosed and open to the public, and that all persons having occasion to cross and pass over the said waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land, and that the said quarry was and is situated near to and between two public highways leading over the said waste land, and was and is precipitous and of great depth and width, and dangerous to persons who might accidentally deviate or stray respectively, or who might have occasion to cross over the said waste land for the purpose of passing from one of such roads to the other of them beside or near the said quarry: That the defendants, well knowing the premises, negligently and improperly, and contrary to their duty in that behalf, left the said quarry wholly unfenced and unguarded, and took no care, and used no means whatever for guarding or protecting the public or any person so accidentally deviating from the said roads respectively, or passing over the said waste land, from falling into the said quarry and being thereby killed or greatly hurt and disabled: That, on the night of the 9th of January, 1859, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken and proceeded along the wrong road, the plaintiff was crossing the said waste land so lying open and unenclosed, towards and for the purpose of getting into the other of them, which he had so occasion to use as aforesaid, and, not being aware of the existence or locality of the said quarry, and being unable by reason *of the darkness [*733 to perceive the same, or the edge or brink thereof, and the same being as aforesaid wholly unfenced and unguarded, he, by reason thereof, and of the negligence of the defendants in that behalf, was precipitated down and into the said quarry to a great depth, and thereby was seri-

ously bruised, hurt, wounded, and disabled, and his leg was broken, and he suffered great pain and anguish, and had sustained permanent injury, and incurred great expense in endeavouring to get cured of the said injuries, and had been and was otherwise greatly damaged. Claim, 100*l.*

The defendants pleaded, amongst other pleas,—thirdly, that the waste land on which the said quarry was and is situate, was not and is not wholly unenclosed and open to the public, as alleged,—fifthly, that the said quarry was not and is not situate near to and between two public highways leading over the said waste-land, in manner and form as alleged.

The defendants also demurred to the declaration, the ground of the demurrer stated in the margin being,—"that the facts stated show no duty on the part of the defendants as against the plaintiff to fence or guard the quarry, or to guard or protect the public from falling into the quarry; and that no cause of action is disclosed by the declaration." Joinder.

The plaintiff demurred to the third and fifth pleas, the grounds of demurrer stated in the margin thereof respectively being:—"that it is not essential to the plaintiff's right to recover, that the waste land should be wholly unenclosed;" and "that it is not essential to the plaintiff's right to recover, that the quarry should be situate near to and between two public highways." Joinder.

*734] *Karslake*, in support of the demurrer.(*a*)—The *declaration discloses no cause of action. The only pretence for saying that any obligation to fence the quarry is cast upon the defendants as the owners of the waste, is, the allegation that "all persons having occasion to cross or pass over the said waste land have been used and accustomed to go along, upon, and across the same without interruption or hindrance from, and with the license and permission of the owners of such

(*a*) The points marked for argument on the part of the defendants were as follows:—

"That the declaration discloses no cause of action against the defendants:

"That the facts stated in the declaration do not show that any duty to guard the quarry rested or was imposed upon the defendants, and that no facts or state of circumstances imposing such duty is shown to have existed:

"That it is shown by, or at all events is to be inferred from, the declaration, that the quarry was in the possession of a third person, who was working the same, and the duty of fencing or guarding it rested, if on any one, on such third person: the defendants at all events are not alleged to have been in possession or occupation of the quarry:

"The declaration shows that the plaintiff himself was guilty of such acts of negligence as disentitle him to sue the defendants:

"The third plea is good in substance: it traverses an allegation in the declaration:

"The allegation is made for the purpose of showing a duty on the part of the defendants to fence or guard the quarry:

"The plaintiff has made the statement which is traversed material, and the statement is made for the purpose of showing that the quarry was in such a position, and situated on ground of such a character, as to render it the duty of the defendants to guard it: he cannot reject the allegation so traversed as immaterial:

"The fifth plea is good in substance, and mainly on the same grounds as are relied upon in support of the third plea: the plaintiff has made it essential to his right to maintain his action that the quarry should be situated as described by him:

"There is one connected statement of facts from which the plaintiff seeks to contend that a duty was imposed on the defendants to guard the quarry, and the plaintiff cannot now reject a part of the statement of facts so made, and contend that such part of the statement is not material."

*waste land." But even an *express* license given to a man to go over the land of another creates no such obligation. [BYLES, J.—When I first knew the county of Cambridge, the greater part of the land was open and unenclosed; and, save where the growing crops offered an impediment, any person might ride or walk all over it. It could hardly, I apprehend, be contended that the owners were bound to fence every dangerous spot, at the peril of being sued if one of the public should meet with any mischance.] Any person availing himself of the supposed permission to cross over this waste land, must accept it subject to the perils attending it. This is very much the case that is put by Abbott, C. J., in Blundell *v.* Catterall, 5 B. & Ald. 315 (E. C. L. R. vol. 7). "Many of those persons," he says, "who reside in the vicinity of wastes and commons walk or ride on horseback in all directions over them for their health or recreation, and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places this practice prevails to a very great degree; and yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil." The true principle is that laid down in Blithe *v.* Topham, 1 Roll. Abr. *Action sur Case* (N.), translated 1 Vin. Abr. 554, pl. 4, Cro. Jac. 158. It is there said, that, if A., being seised of a waste adjoining a highway, digs a pit in the waste, within thirty-six feet of the way, and the mare of B. escapes into the waste, and falls into the pit and is killed, yet B. shall not have any action against A.; because the making of the pit in the waste, and not in the highway, was no wrong to B., but it was by the default of B. himself that his mare escaped into the waste. In Jordin *v.* Crump, 8 M. & W. 782,† where the case is put *of a man, who, passing in the dark along a foot-path, should happen to fall into a pit dug in the adjoining field, by the owner of it, Alderson, B., says: "The party digging the pit would be responsible for the injury, if the pit were dug across the road; but, if it were only in an adjacent field, the case would be very different, for, the falling into it would be the act of the injured party himself." In Seymour *v.* Maddox, 16 Q. B. 326 (E. C. L. R. vol. 71), the declaration stated that the defendant was possessed of a theatre, and of a stage therein, on which dramatic entertainments were given, and of a dressing-room for chorus-singers, and of a floor underneath the stage, in which floor was a cut or hole, and along which floor the performers at the theatre were accustomed to pass from the said dressing-room to the back of the stage; that the plaintiff was hired by the defendant to sing on the stage as a chorus-singer; that it then became the defendant's duty to cause the floor to be so sufficiently lighted and the hole so fenced as to prevent accidents to persons passing from the dressing-room to the stage; that the defendant, well knowing the premises, suffered the floor to be insufficiently lighted, and the hole to be open without any sufficient fence, so that the plaintiff by falling therein was injured. It was held that the declaration was bad, in arrest of judgment, because the facts stated did not raise the duty a breach of which was complained of. So, in Southcote *v.* Stanley, 1 Hurlst. & N. 247,† the declaration alleged that the defendant was possessed of an hotel into which he had invited the plaintiff to come as a *visitor*, and in which there was a glass

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door which it was necessary for the plaintiff to open for the purpose of leaving the hotel, and which the plaintiff by the permission of the defendant, and with his knowledge, and without any warning from him, *737] lawfully opened for the purpose *aforesaid, as a door which was in a proper condition to be opened; nevertheless, that, by and through the mere carelessness, negligence, and default of the defendant, the door was then in an insecure and dangerous condition, and unfit to be opened, and by reason of the said door being in such insecure and dangerous condition, and of the carelessness, negligence, default, and improper conduct of the defendant in that behalf, a large piece of glass fell from the door and wounded the plaintiff: and it was held that the declaration disclosed no cause of action against the defendant. In Deane *v.* Clayton, 7 Taunt. 522 (E. C. L. R. vol. 2), Dallas, C. J., says: "If I place a log across a public path, and injury be thereby sustained, the soil being my own, but the public or individuals having a right over it, an action will lie, because there is a right in others to pass along without interruption: but if there be no right of way, I may, with any view, and for any purpose, place logs on my own land, and a party having no right to be there, and sustaining damage by his own trespass, cannot bring an action for the damage so sustained." In Barnes *v.* Ward, 9 C. B. 392 (E. C. L. R. vol. 67), the excavation was immediately adjoining a public footway, and so amounted to a public nuisance. And in Hardcastle *v.* The South Yorkshire Railway Company, 4 Hurlst. & N. 67,† it was held, that, where an excavation is made near to, but not substantially adjoining a public highway, at common law, no action lies against the owner of the land by a person who has strayed off the highway and fallen into such excavation. Pollock, C. B., delivering the judgment of the court in that case, lays down the true principle which must govern the present. "When," he says, "an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in *738] case of a horse or carriage-way, might, by the sudden *starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences: but, when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different."

Kingslake, Serjt., contrà.(*a*)—The declaration is so framed as to bring

(*a*) The points marked for argument on the part of the plaintiff, were as follows:—

"1. That the declaration is good, because the plaintiff passed over and across the waste land with the license and permission of the defendants, and was not a trespasser in so doing: he was entitled to protection from dangerous excavations made by the defendants or others for them near the line of his course,—Barnes *v.* Ward, 9 C. B. 392 (E. C. L. R. vol. 67); and the defendants were the persons bound to afford this protection, by fencing or otherwise, as the owners of the dangerous land immediately adjoining the quarry, and of the quarry itself, which was worked for their benefit:

"2. That the third plea is bad, because what is essential to the plaintiff's right, is, that all persons were used and accustomed to pass over and across the waste land without interruption or hindrance, and with the license and permission of the owners; and, if this be so, it is immaterial whether the waste land be wholly and in every part unenclosed and open:

"3. That the fifth plea is bad, because the declaration shows a duty in the defendants to fence or protect, arising from the plaintiff's being upon the waste land by the defendants' license and permission, and not being a trespasser when upon and crossing the waste land; and, if so, it it immaterial in what part of the waste land the quarry was situate; and the allegation of its being situate near to and between two public highways, was immaterial."

the case precisely within the principle of Barnes *v.* Ward, 9 C. B. 392 (E. C. L. R. vol. 67). It alleges that the waste land upon and within which the quarry is situate is wholly unenclosed and open to the public, *and that all persons having occasion to cross or pass over the [*739
waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land, and that the quarry is situate near to and between two public highways leading over the said waste land, and is precipitous and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the said waste land for the purpose of passing from one of such roads to the other of them beside or near the said quarry. In Corby *v.* Hill, 4 C. B., N. S. 556 (E. C. L. R. vol. 93), the owner of land having a private road for the use of persons coming to his house, gave permission to A., who was engaged in building on the land, to place materials upon the road. A. availed himself of this permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage. It was held that A. was liable to an action for such injury. Cockburn, C. J., there says: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question: they held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. Could *they* have justified the placing an obstruction across the way, whereby an injury was occasioned to one using the way by their invitation? Clearly they could not." And Willes, J., says: "One who comes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully coming there may receive injury. That is so obvious that it is needless to dwell upon it." Seymour *v.* Maddox and Southcote *v.* Stanley do not touch the question. In Chapman *v.* Rothwell, 1 Ellis, B., & E. 168 (E. C. L. R. vol. 96), the plaintiff, as *administrator to his deceased wife, declared [*740
that the defendant was in the occupation of a brewery and office, and a passage leading thereto from the public street used by the defendant for the reception of customers in his trade of a brewer, which passage was the usual means of access from the office to the public street; yet that the defendant wrongfully and negligently permitted a trap-door in the floor of the passage to be and remain open without being properly guarded and lighted; and that the wife, who had been to the office as a customer of the defendant, and otherwise in the defendant's business, and was lawfully passing along the passage on her return from the office to the street, fell through the aperture caused by the trap-door being and remaining open and not properly guarded and lighted, whereby she was killed: and it was held, on demurrer, that the duty of the defendant, and breach, sufficiently appeared. [KEATING, J.—That case falls within the class of cases where the liability results from an invitation being held out to third persons to go upon the premises.] The real question is whether the plaintiff was lawfully upon the waste, or there was a trespasser. If the former, the defendants are clearly responsible: and, even if the latter be the true state of things, the defendants will be responsible if they have omitted the reasonable precautions which the law requires of all owners of lands adjoining a public way. This

is consistent with the ruling of Lord Kenyon in Brock *v.* Copeland, 1 Esp. N. P. C. 303, and of Tindal, C. J., in Sarch *v.* Blackburn, 4 C. & P. 297 (E. C. L. R. vol. 19), M. & M. 505 (E. C. L. R. vol. 22). In Firmstone *v.* Wheeley, 2 D. & L. 203, 208, Pollock, C. B., in the course of the argument, puts this case,—"Suppose," he says, "a person digs so near a highway as to render it dangerous, unless fenced by day and lighted by night, that might be a trespass to the soil for which the *741] lord of the manor, or owner of the land, *could maintain trespass; but, *there being also a duty to guard the public, a person injured would have a right to sue in case.*"

Karslake was not called upon to reply.

WILLIAMS, J.—I am of opinion that the defendants in this case are entitled to judgment. I will first consider the declaration as if it were without the allegation "that all persons having occasion to cross or pass over the said waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land:" and upon authority, as well as upon the reason of the thing, I think the declaration is bad. So reading the declaration, the averments are, that the defendants were possessed of a waste upon which a stone-quarry was opened and was being worked with their license; that the waste was unenclosed and open to the public, and the quarry was situate near to and between two public highways leading over the waste, and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one of such roads to the other of them beside or near to the quarry; that the defendants negligently, and contrary to their duty, left the quarry unfenced and unguarded, and used no means to protect the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry, and being thereby killed or hurt; and that the plaintiff, having occasion to pass along one of the roads, and having by reason of the darkness taken the wrong one, was crossing the waste for the purpose of getting into the other road, and *742] not being aware of the existence or locality of the *quarry, fell in and was hurt. Now, it is not alleged that the quarry adjoined the public highway, but that it was situate near to and between two public highways leading over the waste, and that it is "dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one road to the other." It seems to me, that, under these circumstances, the law imposes no duty upon the proprietors of the waste to fence the quarry, nor does it render them responsible to persons who may deviate from one or other of the roads and stray upon the waste. The law as to this was long ago settled in Blith *v.* Topham, Cro. Jac. 158, which has been confirmed and acted upon in many subsequent cases. It was there held, that, if A., seised of a waste adjacent to a highway, digs a pit within thirty-six feet of the highway, and the mare of B. escapes into the waste and falls into the pit, and dies there, yet B. shall not have an action against A.; because the making of the pit in the waste, and not in the highway, was not any wrong to B., but it was the default of B. himself that his mare escaped into the waste. The authority of that case is confirmed by the distinction drawn by this court in Barnes

v. Ward, 9 C. B. 392 (E. C. L. R. vol. 67), and pointed out by the Court of Exchequer in Hardcastle *v.* The South Yorkshire Railway Company, 4 Hurlst. & N. 67.† The general doctrine as to the non-liability of owners of land to fence excavations therein was qualified to this extent by those amongst other cases, that the excavation must not be made so near to a public road as to amount to a public nuisance, and that, if it do amount to a public nuisance, and a particular injury result therefrom to an individual, an action will lie,—on the well-established principle of law, that, where a particular injury results from a public nuisance, it is the subject of compensation in damages to *the individual by whom such injury is sustained. The allegation [*743 here amounts to no more than this, that there was a pit or quarry upon the waste somewhere between two public roads,—not so near to either as to constitute a public nuisance, but so near as to be dangerous, not to persons passing along either of the public ways, but to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from the one road to the other. This state of things clearly gives no right of action, unless it be shown that the excavation is so near to the road as to amount to a public nuisance,—a limitation of the rule which is clearly founded upor reason and good sense; for, if the public have a right to the undisturbed user of a way, the owner of the adjoining land cannot deprive them of the enjoyment of that right, which he would substantially do by digging a precipice by the side of it. That would be a public nuisance, which is not charged here. Assuming, therefore, that the declaration had been framed as I have above suggested, I am clearly of opinion that it would not have disclosed any cause of action. Then, how is the case altered by the introduction of the allegation "that all persons having occasion to cross or pass over the said waste land have been used and accustomed to go upon, along, and across the same without interruption or hindrance from, and with the license and permission of, the owners of such waste land?" No right is alleged: it is merely stated that the owners allowed all persons who chose to do so, for recreation or for business, to go upon the waste without complaint,—that they were not churlish enough to interfere with any person who went there. One who thus uses the waste has no right to complain of an excavation he finds there. He must take the permission with its concomitant conditions, and, it may be, perils. Suppose the *owner of land near the sea gives another leave to walk on the edge of a cliff, surely it [*744 would be absurd to contend that such permission cast upon the former the burthen of fencing. Can it make any difference that there is a public highway open to but at some distance from the cliff? A resemblance has been suggested between this case and that of Corby *v.* Hill, 4 C. B. N. S. 556 (E. C. L. R. vol. 93); but there is really no analogy between them. In that case the defendant held out an inducement to persons to come upon the land, by permitting it to be used as the means of access to his house, and therefore he was bound to warn persons so using the road of the obstruction which had been placed there. The principle upon which that case was decided very closely approximates to that which is stated in Barnes *v.* Ward. All that can be said in this case is, that the plaintiff had a tacit permission to cross the waste. It was not the fault of the defendants that he was ignorant of the exist-

ence and locality of the quarry, and of the danger he incurred by crossing the same in the dark. Upon the whole, it seems to me that this case is not distinguishable from Blyth *v.* Topham, and does not fall within the exception established by Barnes *v.* Ward, and acted upon in Hardcastle *v.* The South Yorkshire Railway Company. I therefore think our judgment must be for the defendants.

KEATING, J.(*a*)—I also think this declaration cannot be sustained. My Brother *Kinglake* has contended that the allegations as to the proximity of the quarry to the roads, and the danger arising therefrom, are tantamount to the allegations which were held to entitle the plaintiff in Barnes *v.* Ward to recover. But there the allegation was, that
*745] the defendant was possessed of a *messuage, with the appurtenances, near to a common and public footway, in front of and before which said messuage, and parcel of the appurtenances thereof, and close to and by the side of the said footway, and abutting upon and opening into the same, there then was a large hole, &c.,—which is very different from that which is alleged here. It is not alleged here that the quarry was so near to the public roads as to be dangerous to persons passing along them, but only that it was "dangerous to persons who might accidentally deviate or stray respectively, or who might have occasion to cross over the said waste land for the purpose of passing from one of such roads to the other of them, beside or near the said quarry." In Barnes *v.* Ward, the excavation was so near the public footway as to interfere with the rights of the public, and so was a public nuisance. The relative rights of the public and of the owner of the land are thus dealt with by Pollock, C. B., in Hardcastle *v.* The South Yorkshire Railway Company, 4 Hurlst. & N. 67, 74,†—"When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step, or being affected with sudden giddiness, or, in the case of a horse or carriage-way, might, by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but, when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road on a dark night and losing his way may wander to any extent; and, if the question be for the jury, no one could tell whether he was liable for the consequences of his act upon his own land or not. We
*746] think that *the proper and true test of legal liability is, whether the excavation be substantially adjoining the way; and it would be very dangerous if it were otherwise,—if in every case it was to be left as a fact to the jury whether the excavation were sufficiently near to the highway to be dangerous. When a man dedicates a way to the public, there does not seem any just ground, in reason and good sense, that he should restrict himself in the use of his land adjoining, to any extent, further than that he should not make the use of the way dangerous to the persons who are upon it and using it; to do so would be derogating from his grant: but he gives no liberty or license to the persons using the way to trespass upon his adjoining land; and, if they in so doing come to misfortune, we think they must bear it, and the

(*a*) Byles, J., had gone to Chambers.

owner of the land is not responsible." So, here, I think, that, to throw upon the owners the obligation of fencing this excavation in their waste land adjoining the roads, it ought to be shown that the excavation was so near to the roads as to be dangerous to persons lawfully using them. There is no obligation cast upon the owner of land to fence a pit or excavation which is dangerous only to those who deviate from the road and so become trespassers. For these reasons, I concur with my Brother Williams in giving judgment for the defendants.

Judgment for the defendants.

*GREEN *v.* SICHEL and Others. *Feb.* 25. [*747

A. sold goods to B., to be delivered "free on board" at Liverpool, for Trieste. The goods were placed by A. on board a steamer, *to be delivered to the order of* B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading or some other document giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. (who the jury found had not *contracted* to pay the freight) was unable to comply with the custom by producing the bill of lading:—Held, that B. by his conduct dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading.

THIS was an action brought by the plaintiff to recover 243*l.* 14*s.* 10*d.*, the price of certain iron sold by him to the defendants in March, 1859, to be delivered "free on board" at Liverpool, for Trieste.

The cause was tried in the Mayor's Court, London, before the recorder. It appeared that no shipping instructions were given at the time the contract was entered into; but eventually the plaintiff was directed to put the iron on board the first steam vessel for Trieste, deliverable to the defendants' order. There being at this time war between France and Sardinia and Austria, there were no sailing vessels trading between Liverpool and Trieste, and in consequence of the great demand for tonnage steam freights had risen considerably. It was proved to be the usage at Liverpool to prepay freight for goods sent by steam vessels: and Messrs. Bibby & Son, who were the sole steam-carriers between that port and Trieste, never gave a mate's receipt, and, having received the iron on board, refused to give a bill of lading for it without being paid a much higher freight than had theretofore been charged. The plaintiff's agent showed the defendants the correspondence he had with Bibby & Son upon the subject, and asked them if he should pay the increased freight; but the defendants said they would have nothing to do with it. The plaintiff's agent at the time of shipping the iron made out a bill of lading stating it to have been shipped by the defendants, and making it deliverable to their order; and he directed Bibby & Son to hold the iron *for the plaintiff*, but *telling them at the same [*748
time that it was to be *at the disposal of the defendants.*

It was contended on the part of the defendants that there was an implied contract on the part of the plaintiff to pay the freight; and they gave evidence of a custom in the trade, that, where goods are sold, as the iron in question was, to be delivered free on board, the seller was

not entitled to be paid the price without producing a bill of lading or mate's receipt to show that the goods are actually shipped.

For the plaintiff it was insisted that there was no contract on his part, express or implied, to pay the freight; that the circumstances which prevented his obtaining a bill of lading or mate's receipt dispensed with the obligation to produce it before demanding payment for the goods; and that, as the goods were shipped and were placed at the disposal of the defendants, they were bound to pay the price of them.

The learned recorder, after telling the jury, that, in order to make it available, a custom must be so general and well known that both buyer and seller must be presumed to have been cognisant of it, and to have contracted with reference to it, left the following questions to them,—first, whether by the custom of the trade the price of goods which are sold to be delivered free on board is payable to the seller before production of a bill of lading or some other document giving evidence of such goods being on board,—secondly, whether the plaintiff in the present case undertook to pay the freight and to obtain a bill of lading,—thirdly, whether, if he did so undertake, he was subsequently released from such undertaking,—fourthly, whether the plaintiff or his agent parted with the control over the goods,—fifthly, whether the plaintiff or his agent placed the goods under the control of the defendants,—sixthly, whether, *749] when the goods *were placed on board by the plaintiff or his agent, it was done with the intention of delivering them to the defendants.

The jury answered the first and second questions in the negative (as to the latter saying that there was no *contract* on the part of the plaintiff to pay the freight, but he undertook to do it as a matter of courtesy), and the fourth, fifth, and sixth in the affirmative.

The learned recorder directed that a verdict be entered for the defendants; but he reserved leave to the plaintiff to move to enter a verdict for him for 243*l.* 14*s.* 10*d.*, if the court should be of opinion that he was entitled to recover notwithstanding the finding of the jury upon the first two questions submitted to them.

O'Malley, Q. C., on a former day in this term, accordingly obtained a rule nisi to enter a verdict for the plaintiff, on the grounds,—first, that, upon the finding of the jury, the verdict ought to be entered for the plaintiff,—secondly, that the finding of the jury on the first question put to them was not material,—thirdly, that the judge ought, upon that finding, to have asked the jury whether the delivery of such document showing that the goods had been placed on board had been virtually dispensed with,—fourthly, that the finding of the jury upon that point was against the evidence. It was at the same time reserved to the defendants to contend, upon the argument of the rule, that the findings of the jury were not warranted by the evidence.

James Wilde, Q. C., and *H. James*, on a subsequent day, showed cause.—There was no evidence to warrant the finding of the jury upon the fourth, fifth, and sixth questions which were submitted to them by *750] the learned recorder. It was insisted for the defendants *at the trial, that there was one invariable and uniform custom; that, upon a contract for the sale of goods to be delivered "free on board," the buyer was not liable to be called upon for payment until a bill of lading or a mate's receipt was handed over to him. The finding of the

jury upon the first question put to them distinctly affirmed that custom. It was proved that Bibby & Son never gave mates' receipts, and that it was not the practice for the masters of steam vessels to give out bills of lading until the freight was paid. It was contended on the part of the plaintiff that the goods were under the control of the defendants from the moment they were put on board: but it was not shown that they had any notice that the goods were on board until after the vessel had left Liverpool. If the contract was as the jury have found, the time for payment of the price of the iron had not then arrived. The plaintiff was bound to hand the defendants some document of title before he was entitled to insist upon payment: Schuster *v.* McKellar, 7 Ellis & B. 704 (E. C. L. R. vol. 90). [ERLE, C. J.—The mere putting the goods on board was not enough to pass the property in them to the buyers.] The plaintiff should have paid the freight, and then he might have recovered it from the buyers.

O'Malley, Q. C., and *C. Robinson*, in support of the rule.—It was never contested at the trial that the iron was put on board in fulfilment of the plaintiff's contract. There was no question as to the propriety of the shipment at the time it was made. When the fact of the excessive freight being demanded was communicated to the defendants, and they declined to have anything to do with the matter, if the plaintiff had paid it, he could not have been said to have done so at the request of the defendants. The iron was by the bill of lading *made deliverable to the defendants' order, and was completely under their control. In Browne *v.* Hare, 4 Hurlst. & N. 822,† the defendants, merchants at Bristol, through a broker, contracted to buy of the plaintiffs, merchants at Rotterdam, ten tons of the best refined rape oil, to be shipped "free on board" at Rotterdam in September, 1857, at 48*l.* 15*s.* per ton, to be paid for on delivery to the defendants of the bills of lading, by bill of exchange to be accepted by the defendants, payable three months after date, and to be dated on the day of shipment of the oil. On the 8th of September, the plaintiffs (having on the previous day advised that the shipment would be made) shipped on board a general ship trading between Rotterdam and Bristol five tons of the oil, and the master signed a bill of lading by which the oil was deliverable "unto shippers' order," and the plaintiffs endorsed it specially to the defendants. On the same day, the plaintiffs enclosed in a letter to the broker the bill of lading, invoice, and bill of exchange drawn on the defendants in accordance with the contract. On the night of the 9th the ship with the oil on board was run down in the Bristol Channel, and the oil totally lost. The plaintiffs' letter of the 8th arrived at Bristol on the afternoon of the 10th, in due course of post, but after business hours. On the morning of the 11th the broker left with the defendants the bill of lading, invoice, and bill of exchange for their acceptance. At that time he knew of the loss of the ship. In about two hours afterwards the defendants returned to the broker the documents left with them, on the ground that, under the circumstances, they were not liable to pay for the oil. In an action for not accepting the bill of exchange, and for goods sold and delivered, the jury stated, that, in their opinion, according to mercantile usage, the risk of the *loss of the oil was on the defendants. It was held by the Exchequer Chamber (affirming the judgment of the Court of Exchequer), that the property

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in the oil passed to the defendants when it was placed "free on board," in performance of the contract; and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it "free on board," or for the purpose of retaining a control over it and continuing to be owners, contrary to the contract. Crompton, J., in the course of the argument, says: "The law is correctly stated by Lord Brougham in his judgment in Cowas-jee *v.* Thompson, 5 Moore's P. C. 165, viz., 'that, when goods are sold in London, free on board, the cost of shipping them falls on the seller, but the buyer is considered as the shipper.'" In Cowas-jee *v.* Thompson, goods contracted to be sold and delivered "free on board," to be paid for by cash or bills, at the option of the purchasers, were delivered on board, and receipts taken from the mate by the lighterman employed by the sellers, who handed the same over to them. The sellers apprised the purchasers of the delivery, who elected to pay for the goods by a bill, which the sellers having drawn was duly accepted by the purchasers. The sellers retained the mate's receipt for the goods, but the master signed the bill of lading in the purchasers' names, who, while the bill they accepted was running, became insolvent. It was held by the judicial committee of the Privy Council (reversing the verdict and judgment of the Supreme Court at Bombay) that trover would not lie for the goods at the suit of the vendors, for that, on their delivery on board the vessel, they were no longer in transitu, so as to be stopped by the sellers; and that the retention of the mate's receipts by the sellers was immaterial, as, after their election to be paid by a bill, the receipts of the *mate
*753] were not essential to the transaction between the seller and purchaser. Lord Brougham there said: "Numberless reasons occur to show that no such doctrine can have any foundation as the one on which the judgment below proceeded. The lighterman may, and generally does, take one receipt for all the goods he delivers, without specifying any parcel. Then, how can the complete delivery of each person's goods, and their property finally vesting in him, depend on the possession of a document which only one of them can by possibility hold? But the best answer to the position contended for, and the best removal of it from the case, is, the obvious consideration that the taking a receipt is a mere accident, not essential to the transaction between the buyer and seller, however good for binding a third party, the shipowner or his captain or mate; and, no receipt being necessary, no non-delivery of it can affect the proceeding." The first question, therefore, which was put to the jury was immaterial and irrelevant. It is clear that the property in the iron passed to the defendants upon the shipment, and the custom has nothing to do with the question. *Cur. adv. vult.*

ERLE, C. J., now delivered the judgment of the court:

In this case we are of opinion that the rule for entering a verdict for the plaintiff ought to be made absolute, with costs. It appears by the answers given by the jury to the fourth, fifth, and sixth questions put to them by the learned Recorder, that the plaintiff parted with the control over the goods,—that they were placed under the control of the defendants,—and that, when they were placed on board by the plaintiff, it was done with the intention of delivering them to the defendants.

*According to the case of Brown *v.* Hare, 4 Hurlst. & N. 822,†
*754] these facts would establish the plaintiff's right to recover the

price of the iron as sold and delivered, were they not qualified by the answer given to the first question put by the Recorder to the jury, finding that by the custom of trade the price of goods to be delivered F. O. B. is not payable before production of the bill of lading or some other document giving evidence of their being on board.

The objection to the plaintiff's recovering which this answer raises, is, that, as he did not in fact produce any such document, he did not entitle himself to the price. But we are of opinion that the defendants cannot be allowed to take this ground. The sole purpose of the custom is obviously to certify the purchaser that the goods have been duly put on board pursuant to the vendor's contract.

In the present case, the defendants resisted payment, on the ground, that, notwithstanding the goods had been so put on board, the price was not payable till the bill of lading was obtained and handed to them, insisting that it was the plaintiff's duty as vendor to procure it, and refusing, for that cause, by their agent, when informed that the ship-owners declined to hand over the bill of lading till the freight was paid, to have anything to do with the matter. The only contest, therefore, between the parties, was, whether, besides putting the goods on board, it was the duty of the vendor, under the contract of sale, to procure the bill of lading, and to prepay the freight, at all events if that should be necessary in order to obtain the bill of lading. But the jury have found, in answer to the second question put to them, that the plaintiff did *not* undertake to pay freight or take out a bill of lading.

It appears, therefore, to us, that the defendants, having turned out to be in the wrong as to the excuse *they put forward for not paying [*755 the price, cannot now be allowed to set up the custom, and say they were not duly certified that the iron had been properly put on board; but that they must be taken to have discharged the plaintiff from the strict observance of it. Rule absolute accordingly.

In the matter of the Complaint of THOMAS NICHOLSON the Younger and ISAIAH BIRT NICHOLSON against THE GREAT WESTERN RAILWAY COMPANY. *Feb.* 25.

Decision in Nicholson v. The Great Western Railway Company, 5 C. B. N. S. 366 (E. C. L. R. vol. 94), reviewed and upheld.

IN Michaelmas Term, 1858, *Manisty*, Q. C., obtained a rule on behalf of Messrs. Nicholson, coal dealers in the Forest of Dean, calling upon the Great Western Railway Company to show cause why a writ of injunction should not issue against them, pursuant to the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, enjoining the said company to desist from giving an undue preference to the Ruabon Coal Company (Limited) for or in respect of the carriage of coals on their line of railway, and enjoining them not to charge the complainants for the carriage of coals at a higher rate than they charge the Ruabon Coal Company, having a due regard to the circumstances, if any, which render the cost to the railway company of carrying for the one party less than the cost of carrying for the other,—with costs.

The motion was founded upon an affidavit of Thomas Nicholson, which stated in substance as follows:—

*756] 1. The complainants are dealers in coal raised in the *Forest of Dean, transmitting many thousand tons a year from Bullo and Lydney, by means of the Great Western Railway, to their customers or agents for sale at or near the various stations of the railway and its branches.

2. Aaron Goold and John Hepworth are lessees under the Crown and proprietors of extensive mines and collieries in the Forest of Dean, and are engaged as partners in working the same; and, in the course of such business, they raise annually many thousand tons of coal, the greater portion of which they transmit to Bullo, and there deliver to the Great Western Railway Company for the purpose of being carried by them, by means of their railway, either for the traders in coal who purchase the same from them deliverable by them there, or on their account to their customers or agents for sale thereof at or near the various stations of the railway and its branches.

4. Grange Court, the point of the Great Western Railway nearest to Bullo and Lydney, which are both on the South Wales Railway, is about five miles from the former and twelve from the latter.

5. The Great Western Railway Company is entitled to one-fourth of the capital and one-third of the revenue of the South Wales Railway Company, and to nominate one-third of the directors thereof, with the privilege to supply all rolling stock; and, by arrangement with the South Wales Railway Company, the whole of the coals at Bullo and Lydney intended to pass on to or over any portion of the Great Western Railway are there received by the Great Western Railway Company; and that company charges freight as shown on Table B. (5 C. B. N. S. 418 (E. C. L. R. vol. 94)); and Table C. (5 C. B. N. S. 413) shows the rates of carriage from Bullo and Lydney, and the Great Western and South Wales Companies' proportions respectively,—the rate of charge

*757] to the Ruabon Coal Company (hereinafter *mentioned) being for a ton of 21 cwt. of 112 lbs., but to the complainants and other coal traders in and from the Forest of Dean for a ton of 20 cwt. of 112 lbs.

7. The Great Western Railway is the only railway by which the coal raised in the Forest of Dean can be forwarded to London, and the southern, eastern, and western parts of England, and the various stations of the Great Western Railway and its branches.

8. Bullo and Lydney are the nearest points on the said line of railway to coal-mines in the forest; and, since the opening of the South Wales Railway to those stations, the complainants and Goold and Heyworth have been accustomed to deliver or purchase to be delivered at Bullo and Lydney respectively large quantities of coal for the purpose of being put on the railway there, and conveyed by the Great Western Railway Company to various stations on the said lines of railway for sale as aforesaid.

9. For the purpose of establishing the said trade, and promoting the sale of the coal at or near such stations, and conducting the said traffic, the complainants and Goold and Heyworth have expended very considerable sums of money, besides personal labour; and, until the arrangement with the Ruabon Coal Company hereinafter complained of was

entered into, a prosperous business was carried on by them; but, since the said arrangement was entered into, their trade and that of the other coal traders in the Forest of Dean has been and is thereby seriously injured.

10. Finding that the Great Western Railway Company did not afford them all reasonable facilities for the receiving and forwarding and delivery of traffic upon and from the said line of railway to the various stations on their railways and branches, the complainants and other persons in the Forest of Dean have incurred a very considerable expense in providing a *large number of trucks to assist in the conveyance of the said coals from Bullo and Lydney to the stations of the Great Western Railway. [*758

11. Upwards of two years since, a joint stock company was established for the working of certain mines of coal at Ruabon; and the formation of the said company was mainly promoted by the directors and officials connected with the Great Western Railway Company.

12. The Ruabon Coal Company was duly registered pursuant to the 17 & 18 Vict. c. 31. [A copy of the memorandum of association, with the names and addresses of the subscribers, was set out.]

13, 14. The whole of the said persons are either officers of or persons immediately connected with the Great Western Railway Company,—one being locomotive superintendent thereof, and having great power and influence over the supply of engine power and the various officers and servants of the railway, another being a director of the Great Western Railway Company, another the son of the secretary, another a clerk in the registration office of the company, and others clerks at the Paddington terminus.

15. The whole paid-up capital of the said company as registered amounts to 28,700*l.*, and the whole has been subscribed by persons in the service of or connected with the Great Western Railway Company.

16. The Ruabon Coal Company has been actively engaged in raising and getting coal ever since its establishment, and sending it along and over the Great Western Railway Company's lines to the various stations thereon.

17. Ever since it commenced operations in July, 1856, most undue preference and partiality have been exhibited to and in favour of the Ruabon Coal Company, to the prejudice of the complainants and other persons interested in the Forest of Dean coal trade.

*18. The Great Western Railway Company, contrary to and in violation of their own acts, and of the statute 17 & 18 Vict. c. 31, make and give an undue or unreasonable preference or advantage to and in favour of the traffic in Ruabon coal, and subject the traffic of the Forest of Dean coal to undue or unreasonable prejudice or disadvantage. [*759

19. The Great Western Railway Company also, in violation of the said acts, make and give an undue or unreasonable preference or advantage to or in favour of the Ruabon Coal Company in the same description of goods as those in which the complainants trade and traffic, and subject the complainants and their goods or traffic to undue or unreasonable prejudice or disadvantage.

20. The table marked B. (antè, p. 756) is a statement of charges made for the conveyance of coal by the Great Western Railway Com-

pany, and is in every respect correct, and shows a very great and undue advantage and preference afforded by the Great Western Railway Company in favour of the Ruabon Coal Company,—the whole of the coal brought from or sent on to the said line at Ruabon or its neighbourhood being sent by the Ruabon Coal Company.

21. An agreement was entered into on the 31st of July, 1856, between the Great Western Railway Company of the one part, and the Ruabon Coal Company of the other part,—see the agreement, 5 C. B. N. S. 383(*a*) (E. C. L. R. vol. 94).

23. The contents of the agreement were not known to the Forest of Dean traders until after June, 1857.

24. When the agreement was made, the Great Western Railway Company and the Ruabon Coal Company knew that a very small part of the Forest of Dean coal was or would be sent to London (which is beyond
*760] 100 miles from Grange Court), or to places *beyond 100 miles from Grange Court; and the fact is that nine-tenths of it, or thereabouts, has been and is sent to stations on the Great Western Railway which are within 100 miles from Grange Court and above 100 miles from Ruabon, and to which stations large quantities of the Ruabon coal are sent, and which come into unfair competition with the Forest of Dean coal, to the great prejudice of the complainants and the coal traders and owners of collieries in the Forest of Dean; and the complainants verily believed that such agreement was framed by the railway company for the express purpose of bringing the coal of the Ruabon Company into unfair and unreasonable competition with coals coming from the Forest of Dean.

25. There are at least seventy stations which are within 100 miles of Grange Court, to which nearly the whole of the Forest of Dean coal has gone and now goes, every one of which stations is more than 100 miles from Ruabon, and at a great number of which stations the Ruabon Coal Company have brought and bring their coals into undue and unfair competition with the coals of the complainants and of other coal dealers in the Forest of Dean: and Mr. Saunders, the secretary of the Great Western Railway Company, has admitted, as the fact is, that the average receipts per ton for the tonnage and terminals of all coals sent from Bullo and Lydney to stations on the Great Western Railway is 4*s*., which is equal to 8/16ths of a penny per ton per mile and terminals for a distance of sixty miles.

26, 27. South of Banbury there are only twenty-four stations which are beyond 100 miles from Grange Court, to ten of which the complainants have never sent any coals from the Forest of Dean: and north of Banbury the district is not accessible to Forest of Dean coal, in consequence of its proximity to northern coal-fields, with narrow gauge communications.

*761] *28. The offer to dealers in Forest of Dean coal of an agreement similar to the Ruabon coal agreement is manifestly delusive and a mere cloak for concealing undue favour and partiality to the Ruabon Coal Company in their coal traffic.

29. The circumstances herein appearing, coupled with the position of the stations, sufficiently prove that the agreement with the Ruabon Coal Company must of necessity be unduly advantageous and preferential to that company, and that it is a mere mockery to offer a similar agree-

ment to the complainants and to traders in coal raised in the Forest of Dean.

30. The said agreement contains many provisions which give advantages and preferences to the Ruabon Coal Company, none of which could be enjoyed by the complainants, which are undue and unreasonable.

31. The complainants and Goold and Heyworth and their customers are only allowed twenty-four hours for unloading their goods from the trucks; and, if they fail to unload within that time, they are charged demurrage, while the Ruabon Coal Company are only charged at the unloading place after forty-eight hours from the time of notice in writing being given, and they are not charged with any demurrage whatever at those stations where the railway company have provided depots and conveniences, and where the business of the Ruabon Coal Company is conducted by a manager appointed by the railway company or by the superintendents and station masters, as set forth in paragraph 9 of the agreement.

32. It is impossible, for the reasons herein appearing, for any trader in Forest of Dean coal to enter into an agreement similar to that made by the Ruabon Company; and, so far from the agreement being in accordance with any usual or well-known principle, the *complainants believe such an agreement (taking into consideration [*762 the whole of its powers) was never before entered into by or with any railway company.

33. There is a provision in the agreement for full train loads; but, in practice, this is not and never has been carried out, and it is impossible practically to carry it out; for, full train loads cannot be sent throughout from Ruabon, on account of the gradients between Ruabon and West Bromwich (which is upwards of a distance of 60 miles), and coals sent by the Ruabon Coal Company are delivered at many stations, and of necessity the train is and must be broken up for that purpose.

34. The coal from the Forest of Dean is carried by special trains, as arranged and directed by the Great Western Railway Company, and practically it is carried in as advantageous a manner to the Great Western Railway Company as that which is carried for the Ruabon Company: and for some time Goold and Heyworth and the complainants were in the habit of sending loads which the Great Western Railway Company called full train loads, but the practice ceased and was discontinued at the request of the Great Western Railway Company, on account of the inconvenience which they alleged that they thereby sustained.

35. The trade of the complainants and of Goold and Heyworth, and the trade in coal from Bullo and Lydney upon the Great Western Railway is large, regular, and constant, and, to the best of the deponent's belief, exceeds in quantity the coal sent by the Ruabon Coal Company: and the complainants verily believe that the low rates charged to the Ruabon Coal Company, taken in conjunction with the other advantages afforded to the said company by the agreement, are not remunerative to the railway company, or, if they are in any degree remunerative, they *are not nearly so much so as the higher rates charged to the [*763 complainants and the other traders in Forest of Dean coal, all circumstances being taken into consideration; and the complainants

believe, that, if the matter was submitted to a detailed investigation by an experienced traffic manager, it would be found that the allegations of the deponent are true.

36. The rates charged on Forest of Dean coals without agreement are not fair and reasonable, but, on the contrary, are unfair, unreasonable, and disproportional as compared with the lower rates charged under the agreement with the Ruabon Company: and there is not any difference, as affecting in favour of the Ruabon Coal Company the cost of carriage, between the circumstances under which the Great Western Railway Company have carried or carry coals for the Ruabon Company and the circumstances under which they have carried or carry coals for the complainants and Goold and Heyworth and any other traders from Bullo and Lydney.

37. For distances under 50 miles, the ordinary rates are charged to the Ruabon Coal Company, and, for distances exceeding 50 but less than 100 miles, higher rates are charged than for distances exceeding 100 miles; but this is not a well known or usual principle of charge adopted by the Great Western Railway Company: on the contrary, the complainants and Goold and Heyworth and other traders from Bullo and Lydney, are charged by the Great Western Railway Company one and the same rate per ton per mile without regard to distance; and the same rate per ton per mile is charged for the Forest of Dean coal whether it is sent 50 or 150 miles, or any other greater distance.

38. Forest of Dean coals consigned to stations of the Great Western Railway on the Wilts and Somerset branch are taken from Swindon with
*764] coals from *Ruabon consigned to the same stations, by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 8/16ths of a penny per ton per mile, while Ruabon coal is charged 7/16ths of a penny per ton per mile for the distance they travel together.

39. Forest of Dean coal sent to stations east of Didcot, is taken from that place with coal from Ruabon consigned to the same stations by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 8/16ths of a penny per ton per mile, while Ruabon coal is charged 7/16ths of a penny per ton per mile.

40. Forest of Dean coal sent to stations on the Wycombe branch is taken from Maidenhead with coal from Ruabon consigned to the same stations by the same trains, and delivered in the same manner: and Forest of Dean coal is charged 1*s.* 6*d.* per ton for conveyance from Maidenhead to any Wycombe branch station, while Ruabon coal is charged only 7/16ths of a penny per ton per mile, which amounts to a varied charge of from 2*d.* to 5*d.* per ton only, according to distance.

42. The effect of the said agreement, if supported, will be, to do incalculable injury to the Forest of Dean coal owners and coal dealers, and to give the Ruabon Company undue and unfair advantages over them, and is not only calculated, but manifestly intended, to protect the Ruabon Coal Company from fair competition.

44. The collieries in the Forest of Dean have been established at great cost, and they afford employment to thousands of persons; and, unless the Great Western Railway Company are compelled to carry the coals gotten therefrom upon equal terms with the Ruabon coal (all cir

cumstances being considered), it will be impossible to carry on a fair trade in the Forest of Dean coal.

Montague Smith, Q. C., and *Phipson*, showed cause, *upon [*765 the affidavits of James Grierson, the general manager of the goods, coal, and mineral traffic of the Great Western Railway Company, Mr. Seymour Clarke, the general manager and superintendent of the company, Edward Wheler Mills, and Henry Simonds, directors of the company, Matthew Kirtley, civil engineer, and superintendent of the locomotive department of the Midland Railway Company, William Lister Newcombe, general manager of the goods, coal, and mineral traffic of the Midland Railway Company, Archibald Sturrock, civil engineer, and superintendent of the locomotive department of the Great Northern Railway Company, Charles Alexander Saunders, secretary to the Great Western Railway Company, and Joseph Beattie, superintendent of the locomotive department of the South Western Railway Company.

Grierson's affidavit was to the following effect:—

1. I have had large experience in the coal and mineral traffic of the Great Western Railway: the details of such traffic, including the coal traffic from the Forest of Dean, Ruabon, and elsewhere, is under my general superintendence.

2. In nearly all places where the Forest of Dean coal competes with the Ruabon coal, the charges made by the Great Western Railway Company for carriage are as high in the aggregate to the Ruabon Coal Company as they are to the complainants, though they may be less per ton per mile, and very often they are higher.

3. For instance, the charge made to the complainants for coal carried to Paddington from Bullo in owners' wagons is stated to be 6*s*. 9*d*. per ton, and from Lydney 7*s*. 1*d*. per ton, while the charges to the Ruabon Coal Company are 7*s*. 6*d*. per ton. The charges made to the complainants for coal carried to Bull's Bridge in owners' wagons are stated to be 6*s*. 4*d*. and *6*s*. 8*d*. per ton from Bullo and Lydney [*766 respectively, while the charge made to the Ruabon Coal Company would be 7*s*. 1*d*. per ton. The charges made for coal carried to Reading in owners' wagons from Bullo and Lydney respectively are said to be 5*s*. 4*d*. and 5*s*. 8*d*. per ton, while the Ruabon Company are charged 6*s*. 2*d*. a ton. The charges made by the company for coal carried to Swindon in owners' wagons from Bullo and Lydney respectively are said to be 3*s*. 7*d*. and 3*s*. 11*d*. a ton, while the Ruabon Company pays 6*s*. 5*d*. a ton.

4. In regard to Oxford, the Ruabon Coal Company have a small advantage of 2*d*. a ton over coal sent in owners' wagons from Lydney; but the charges to Reading from Bullo show a sum of 2*d*. a ton in favour of the Forest of Dean coal; and, on the other hand, at Didcot, where the coals compete, the Forest of Dean coal owners have an advantage over the Ruabon Coal Company of 11*d*. per ton if the coal is sent from Bullo, and 7*d*. a ton from Lydney; and at Maidenhead, where the coal also competes, the Forest of Dean coal owners have an advantage of 8*d*. and 6*d*. a ton respectively.

5. The Forest of Dean coal owners are, as I believe, under a disadvantage in respect of their coal in competition with the Ruabon coal, partly because the quality is not so good for household purposes, and

partly because, as I am informed, a much higher price is charged for the Forest of Dean coal at the collieries than is charged for the Ruabon coal.

6. The coal traffic from the Forest of Dean generally, and from the complainants, is an irregular and uncertain, as well as a small traffic. From the absence of any guarantee as to quantity, and the uncertainty and irregularity of the traffic, it is impracticable, and would be most expensive to the railway company, to appropriate engines and trucks *767] for such traffic, as is done *for the Ruabon coal: and I believe the agreement with the Ruabon Coal Company is remunerative to the Great Western Railway Company, and that the conveyance of coal under it, taking the whole of the provisions, is more profitable to the railway company than the coal traffic from the Forest of Dean.

7. There is a large number of trucks constantly and regularly employed for the Ruabon coal traffic under the agreement, by which a very considerable saving of expense and gain are obtained by the railway company: and, as the Great Western Railway Company provide trucks under the Ruabon coal agreement, they are sometimes enabled to send and do send down back loads of manure and other materials in some of the trucks, and thus collaterally the Ruabon Company gain advantage and save expense, so that the railway company can afford to make charges for trucks to the Ruabon Company less than their ordinary charges.

8. It is a recognised principle in the business of the railway companies generally, and more especially as to coal and mineral traffic, that the longer the distance and the fuller the loads, within certain limits, the greater the gain to the railway company in proportion over shorter distances and smaller loads, the saving as regards locomotive power and trucks being great on the longer distance. The reduction in the rate of carriage to the Ruabon Coal Company by their agreement, and the other advantages they are allowed for coal carried beyond 100 miles, is fair, and to the benefit of the railway company. The coal going to places at short distances from the colliery always pays higher rates than coal going long distances. The railway companies generally secure such traffic without special inducement; and the price paid for such coal will allow of a larger charge for the carriage.

*768] 9. The Ruabon Coal Company have been invariably *required to send their coal in full train loads, and have done so accordingly: and in those cases where the full trains of coal sent by the said company have been broken up, it has been done after they have been received by the railway company, and by the railway company for their own convenience.

10. A strict account of the times of arrival and unloading the coal trains has been made out at the various stations, and the Ruabon Coal Company or the consignees charged with any demurrage which according to the said agreement has arisen or may arise in consequence of the detention of the trucks at any of the stations on the Great Western Railway; and no allowance or deduction has been or is permitted by the Ruabon Coal Company from the railway company's charge for such demurrage.

11. In consequence of the stiff gradients between the Gloucester and Swindon stations of the Great Western Railway, coal coming from the

Forest of Dean or other places on the South Wales Railway cannot be carried in such heavy train loads as coal can from West Bromwich, through which the Ruabon coal comes. The coal coming from the South Wales Railway has been and is carried in the most advantageous way for the railway company, either by being sent on in a train by itself, or, if there is not enough to form a full train, then it is attached to an ordinary train. If, in consequence of the Ruabon Coal Company's full train load having been broken up by the Great Western Railway Company, any South Wales coal can be sent on by the train from Ruabon, it is so sent from Didcot as a matter of economy and convenience to the railway company.

12. In October, 1858, I had a correspondence with the complainants respecting the rates at which the Great Western Railway Company would carry coals *for them for guarantied quantities for distances over 100 miles, and also for distances over 50 miles and under 100; and, on the 1st of that month, I forwarded to them a copy of the following terms, as those on which the Ruabon Coal Company were willing to enter into an agreement with them,— [*769

"Contract coal-rates.

"For guaranteed quantities sent in owners' trucks over distances exceeding 100 miles, yearly payment not to be less than 5000*l.*, freight to be uniformly 7/16ths of a penny per ton per mile; with the following terminals,—freight exceeding per annum 40,000*l.*, 3*d.*; 30,000*l.*, 6*d.*; 20,000*l.*, 9*d.*; 15,000*l.*, 1*s.*; 10,000*l.*, 1*s.* 3*d.*; 5000*l.*, 1*s.* 6*d.*

"For guarantied quantities sent in owners' trucks distances over 50 miles and under 100, freight to be uniformly ½*d.* per ton per mile; with the following terminals,—per annum 15,000*l.*, 4*d.*; 10,000*l.*, 6*d.*; 7500*l.*, 8*d.*; 5000*l.*, 10*d.*; 2500*l.*, 1*s.*"

13. The railway company are ready and willing to enter into an agreement with the complainants on the terms of that minute; and several letters passed between me on behalf of the company and the complainants on the subject: but, in November, 1858, the negotiation terminated, as to the distance beyond 100 miles, in consequence of difficulties created by the South Wales Railway Company, and as to the shorter distance in consequence of the complainants requiring that all coals paid for as carried 50 miles should have the advantage of and be charged according to the said scale of prices, though such coals were not in fact carried 50 miles upon the railway.

14. In reference to the statements made by the complainants in the 34th paragraph of their affidavit, it is in reference to the small, irregular, and uncertain traffic coming from the Forest of Dean that full train *loads are not obtained for that traffic; but the complainants' coal is attached to some of the ordinary trains of the company: not only could there be no saving of expense gained by only occasional full train loads, but it would increase the expense to the company to provide for occasional full train loads, unless a certain and constant number could be provided. [*770

15. In practice, the Ruabon Coal Company are kept strictly to the terms of their agreement, not only as to the charge for demurrage of trucks, but as to all other matters.

Mr. Seymour Clarke's affidavit stated that he had had considerable experience in coal, mineral, and other traffic, and in the rates and

charges for the same in reference to the cost and expense to the company; that the Great Northern Railway Company have a very large coal traffic on their lines of railway; that it is an universal rule that a railway company can afford to carry coals and minerals at a less rate for a long distance than for a short distance, and the company would gain as much by coals going for a long distance, say 100 miles and upwards, at low rates, as they would gain on short distances at considerably higher rates; that it is also important to secure full train loads for an engine, and constant and regular traffic, for, thereby the trade can be more economically carried on by the railway company, in consequence of a certain number of engines and trucks being capable of being appropriated to such traffic and kept in constant and regular employment; that the rates given to the Ruabon Coal Company under their agreement with the Great Western Railway Company, and the other advantages given to them under that agreement, are fair, and are remunerative to the railway company, in consideration of the guarantee
*771] of the large and *regular traffic to be sent in full train loads over a distance of 100 miles and upwards: and that, taking a year's traffic, the agreement with the Ruabon Company for their guarantee traffic is far more remunerative to the railway company than the traffic coming from the general coal trade of the Forest of Dean, at the prices charged by the railway company to the dealer for the carriage of such coal without any guarantee of quantity, or for the regularity or for distance, or for coal being carried in full train loads.

The affidavit of Messrs. Mills and Simonds, the two directors, stated, that, in 1855, the directors of the Great Western Railway Company fully investigated the affairs of the company generally, in order to see whether the traffic could be increased and the revenue of the company improved, and to determine upon the best mode of effecting this object; that it came before them in the course of investigation that the collieries at Ruabon had never been properly developed, on account of the insufficiency of capital employed in them, although they had a description of coal peculiarly adapted for the London consumption, and negotiations were had with the owners of the collieries in that district with the view of increasing the traffic; that, in consequence of the failure of attempts to obtain such capital, a company was formed, with a considerable capital, embracing certain officers of the Great Western Railway Company, with the full sanction of the directors, and with the approval of the shareholders, under a distinct resolution to that effect passed at a general meeting of the company, and with this view an arrangement was made for the carriage of coals; that the sole object of the directors in entering into that agreement with the Ruabon Coal Company was, to increase the revenue of the railway company by a fair development of
*772] the coal traffic on their lines of *railway; that, in regard to the distance of 100 miles, at which the reduced rates or advantages of the Ruabon Company were to come into operation, this was arranged without reference to the South Wales or Forest of Dean coal or the coal owners of those or any other districts, but solely because the directors were advised by competent persons whom they consulted, that it was necessary to secure a "lead" or distance of 100 miles and upwards, in order that the railway company might afford to carry coal at lower rates than they could for uncertain distances and for uncertain

loads under 100 miles; that the directors were advised this generally in consequence of the company being able to work the trains at much less cost to the railway company over a long distance and with regular and full train loads, and that, as the railway company would have a guarantee for a considerable amount of yearly increase to be obtained from a minimum of coal sent in full train loads, under those circumstances they could afford to make reduced rates for carriage beyond 100 miles, and generally to grant fair facilities and advantages, and that the agreement with the Ruabon Coal Company was ultimately arranged on those principles; that the Great Western directors uniformly insisted upon a condition that such agreement should be open alike to all other parties who would be willing to enter into the same agreement for a like amount of traffic upon equal terms and conditions, and they had been most anxious, and had invariably offered to all coal proprietors who had applied to them, and, among others, to the complainants, an agreement for the conveyance of their coals upon those terms and conditions; that the trade in South Wales and Forest of Dean coal was at the date of this agreement considered to be comparatively of a local character; and that, in making the agreement, the directors had no intention of favouring *the Ruabon Coal Company over the plaintiffs or any other company or persons, or to subject the coal of the Forest of Dean to [*773 any unfair competition or disadvantage.

The affidavit of Mr. Kirtley stated, that the principal item of expense to the railway company in the cost of running a coal or mineral train, is, the expense for locomotive power, which is made up of a per-centage on capital for original cost, the cost of fuel, wages for engine-men and drivers, and a per-centage for wear and tear, and that this expense is very much proportionately decreased when the engine performs a long journey in one day, by having what is called a long and continuous lead, and also when the full power of the engine is employed by having full train loads provided; that, where there is an ascertained number of trains in each week, each carrying an ascertained load and requiring a fixed and certain number of trucks, the railway company are enabled, from their knowledge of the number of trucks and of the times at which they will be required, to effect a great saving in expense, by devoting certain engines exclusively to such traffic, and that more work at the same cost can be got out of such engines at a regular and certain traffic than if employed in a fluctuating or uncertain traffic, for the carriage of which the company may often be obliged to send specially to their depot for engines; that the cost, calculated per ton per mile on the load drawn, of an engine which has as great a load as it can fairly carry, is very much less to the company than the cost of an engine having only a light load, and that the increased consumption of fuel and the wear and tear of the engine caused by the greater load are by no means in proportion to the difference in the load, and that in fact an engine running without any load at all would cost nearly as much to the company as one having a full load; that it is a *recognised principle, [*774 borne out by every day's experience, that the greater the load, up to the power of the engine, the more economically will it work out per ton per mile; that an engine taking a train 100 miles at one lead can be worked much more economically than one getting only a short lead, and a train going 200 miles on one consecutive lead can be worked

still more economically, the rule being, that, after a certain distance, the longer the journey made by one engine, up to twelve or fourteen hours a day, the less expense it is to the company; that, in the cost of an engine is included the wages of the engine-driver and fireman, who always are appointed to and stay with the same engine, and that the wages of such driver and fireman are paid at a fixed rate for a day of so many hours, and do not vary according to the number of miles travelled or work performed by the engine to which they are attached; that every engine requires a certain and considerable expense to get it into steam before it begins to work, and again to put it out of steam at the end of its day's work, and the time of the driver and fireman is occupied in both operations, so that the greater the amount of work done by such engine whilst it is in full steam the cheaper will be its working, and the cost to the company per ton per mile considerably less; that a long lead with trucks is also important, as lessening the cost to the company, as at the beginning and end of every journey time is lost while the trucks are loaded and unloaded, during which time the company earn nothing, as they only gain while the trucks are travelling loaded at so much per mile; that, for these reasons, a lower rate of freight for a long distance, with a constant trade, is more remunerative to a railway company than a higher rate for short distances with traffic no certain amount of which *775] is guarantied or ascertained; that the rates *charged by the Great Western Railway Company to the Ruabon Company for distances beyond 100 miles, and the other advantages gained by them under their agreement with the Great Western Railway Company, are justified by the length of the lead and the stipulations for full train loads and guarantied quantities which they agree to provide; that, taking a year's traffic, the terms agreed to be given to the Ruabon Company for their guarantied traffic are far more remunerative to the railway company than the traffic arising from the general coal trade of the Forest of Dean at the prices charged by the railway company to the dealers for the carriage of such coal without any guarantee of quantity, or for regularity, or for distance, is for the coal being carried in full train loads; that the rates granted to the Ruabon Coal Company would not be sufficiently remunerative to the railway company without a guarantee of full train loads, nor for a less distance than 100 miles; that the scale for shorter distances than 100 miles, as published by the company, is very moderate and fair; and that no material saving of expense would be obtained by the railway company by carrying only occasional full train loads from the Forest of Dean, as an engine would in all probability be required to be sent from the depot at Swindon to bring away the load, and as the cost of running an engine without a load is nearly the same as with a load.

The affidavits of Messrs. Newcombe, Sturrock, and Beattie, were substantially corroborative of that of Mr. Kirtley.

The affidavit of Mr. Saunders, in addition to the facts deposed to by him on the former occasion (5 C. B., N. S., 380 (E. C. L. R. vol. 94)), contained a general denial of intention on the part of the Great Western Railway Company to favour the Ruabon Coal Company, or that the *776] table *referred to afforded any undue advantage or preference to that company; that the arrangement was in all respects fair and equitable, and was made solely with a view to the advantage of the

railway company; that the distance of 100 miles was fixed expressly against the wish of the promoters of the Ruabon Coal Company, it having been considered and contended, in the interest of the railway company, that coal destined for short distances must necessarily be carried over their lines of railway, and moreover that such coal would bear to pay a higher freight than coal carried for longer distances; that, in making a small difference as to coal to be sent by the Ruabon Coal Company between 50 and 100 miles, they were actuated only by the same principle, of gaining revenue to the railway company and allowing some equivalent for the saving in cost of carriage over the comparatively longer lead, but the coal carried between these distances did not form any portion of the guarantied freight; that the object of the directors of the Great Western Railway Company in making the agreement with the Ruabon Coal Company had been fully and completely answered by the operation of that agreement, for that such agreement was a remunerative one to the railway company, and the conveyance of coals under it, taking into consideration the whole of the provisions, was more profitable to the railway company than the coal traffic from the Forest of Dean, at the prices charged upon such traffic, without any agreement as to a stipulated regular quantity or a stipulated annual payment, or as to full train loads; that the principal cost of all coal or mineral trains, is, the expense of locomotive power, and where there is constant, regular, and ascertained traffic, certain engines can be exclusively devoted to it at a great saving to the company, and much more work can be done by such engines under *such circumstances than for ordinary traffic of the same character; that there [*777 is a very considerable saving of expense to the railway company, where trucks are provided by them, if there is a known and stipulated traffic to be conveyed for a long distance and at certain agreed times, the average number of trucks required per week being ascertained, the same trucks, or nearly so, do the whole work; that a very large capital is invested by the Great Western Railway Company in trucks, and that the longer mileage distance they run with loads, in other words, the more work they do, the greater gain to the company, the cost of wear and tear being by no means in proportion to the extra gain; that the coal trade of the complainants is not of that constant, uniform, and ascertained character as to enable the Great Western Railway Company to work the same with the regularity and economy which they would be able to do were a fixed and stipulated quantity agreed to be sent from the Forest of Dean along the railway in full and regular train loads, or with the regularity and economy with which the railway company do work the Ruabon coal traffic under the agreement; that practically the coal from the Forest of Dean is not carried in so advantageous a manner to the railway company as that which is carried for the Ruabon Coal Company, and that the rates charged on Forest of Dean coals without agreement are fair and reasonable as compared with the lower rates charged to the Ruabon Coal Company under the agreement, regard being had to the whole stipulations of that agreement; that the principle of a graduated charge according to distance, and on trucks with full train loads, is a well-known principle of charge adopted by the railway companies generally; that the stipulations in the agreement with the

*778] Ruabon Coal Company as to the full train loads *were uniformly and strictly enforced, and that, although the trains were occasionally broken up for despatch to different stations, yet the Ruabon Coal Company are required to send, and do send, full train loads away from the colliery, and this breaking up of the trains, when it occurs, is done solely for the convenience of the Great Western Railway Company, and the coal company have no concern or part in it; that the Ruabon Coal Company are held strictly to the period of forty-eight hours allowed for unloading, and a demurrage account is kept against them or their consignees for any excess or delay; that the effect of the agreement with the Ruabon Coal Company is not to injure the Forest of Dean coal owners and coal dealers, or to give the Ruabon Coal Company undue and unfair advantages over them; that the coal from the Forest of Dean, considering the quality and the price charged at the collieries, cannot come to any great distance from the collieries, or to London, in competition with other descriptions of coal, so long as the owners of those collieries require so large a profit on their coals, and that the agreement with the Ruabon Coal Company is not in fact any cause for the want of demand for consumption of the Forest of Dean coals; that, in March, 1857, the complainants were informed that the Forest of Dean coal owners, as well as the Somersetshire coal owners, might combine among several firms to agree jointly so as to make up a guarantied quantity, and get the benefit of reduced rates, and that such an agreement would be entered into by the company the same as if the agreement were with one coal owner, and that thus each of the parties thus entering into such an agreement would get the benefit of the reduced scale on the quantities jointly guarantied by the united coal owners; that it would be inexpedient and unjustifiable, as respects the *779] *interests of the Great Western Railway Company itself, that any impediment or obstruction should be imposed on the traffic of coals from any district because it may compete with some other district, the object and interest of the railway company being to encourage such traffic to the utmost extent, and to give all reasonable aid to its increase and development to all persons, and from whatever district it may be derived; and that the Great Western Railway Company have not, and never had, any interest in the success or failure of the Ruabon Coal Company, except as regards the freight upon the conveyance of such coal, and that their only object in promoting the coal traffic from the collieries in the Ruabon district was, to benefit their own proprietors by means of a profit to be derived from such traffic.

The learned counsel submitted, that the complainants had ample opportunity of bringing forward all their causes of complaint on the former occasion, and were fully heard; that there was no ground for impeaching the judgment at which the court then arrived, nor any new materials now brought forward to justify the court in reversing that decision. [WILLES, J.—This rule was granted for the purpose of enabling the complainants to show that the special agreement with the Ruabon Coal Company was colourable and afforded no justification for the difference of charge. There was no allegation on the former occasion that the agreement was not perfectly bonâ fide, or that the benefits derived under it by the Great Western Railway Company were not a full equivalent for the decrease of charge and other advantages allowed

to the Ruabon Coal Company.] In giving judgment there, the court say,—5 C. B., N. S. 441 (E. C. L. R. vol. 94),—"If we could clearly see that a scale of rates with reference to distance had been framed with the view, and having *the effect, of favouring the Ruabon [*780 coal traffic, and prejudicing the Forest of Dean coal traffic, we should hold it to be an undue preference within the act, in accordance with the decision of the court in Ransome *v.* The Eastern Counties Railway Company, 4 C. B., N. S. 135 (E. C. L. R. vol. 93). But we have no sufficient evidence to lead us to such a conclusion: and, although the complainants may suffer by this scale of rates, in consequence of their local position, that is a matter which the court cannot interpose to remedy." The question is, whether that is made out now. The affidavits in answer show that the contract with the Ruabon Coal Company was made solely for the purpose of bringing increased traffic on the Shrewsbury branch of the railway, which the Great Western Company had possessed themselves of. [WILLIAMS, J.—The judgment of the court upon the former occasion implies that there must be a just and due proportion between the facilities afforded to the party said to be preferred, and the advantages secured to the company.] The only affidavit now produced is that of one of the complainants. He does not suggest that there is any disproportion in that respect; nor do the complainants produce the affidavits of any traffic manager, engineer, or other person conversant with railway affairs, to show that the terms of the agreement are not fair and reasonable, regard being had to the interests of the railway company. The new matter which is introduced wholly fails in that respect. [ERLE, C. J.—We certainly have no idea of impeaching or dissenting from the judgment pronounced on the former occasion.] The present affidavit discloses no new facts: and it is distinctly and conclusively answered by the affidavits filed in answer, and especially by that of Mr. Saunders, who shows the origin and growth of the Ruabon Coal Company, and who is corroborated by persons who *have had great experience upon the subject. [ERLE, C. J.— [*781 Confining it to the new matter, Mr. Nicholson's suggestion is certainly answered by persons who have every means of forming a correct judgment on the subject, and who have all the figures before them.] The complainants should at least have mentioned in their affidavit the fact of similar agreements having been offered to and rejected by them. [WILLIAMS, J., referred to Harris *v.* The Cockermouth and Workington Railway Company, 3 C. B., N. S. 693 (E. C. L. R. vol. 91).]

Manisty, Q. C., and *C. Pollock*, in support of the rule.—If the affidavit upon which the rule was granted is not sufficient to warrant the court in coming to the conclusion that the charges made to the coal-owners of the Forest of Dean are unreasonable as compared with those made to the Ruabon Coal Company, enough at all events appears to induce them to put the matter in a train for investigation in the mode pointed out by the statute. The affidavits now produced by the Great Western Railway Company failed to show that their agreement with the Ruabon Coal Company is a remunerative one to them. The main, indeed the only, ground upon which they seek to uphold its propriety, is, that the "continuous lead" of 100 miles is more remunerative than a shorter run. But they altogether suppress the fact that at Wolverhampton there is a break of gauge, which necessitates the employment

of two sets of trucks and two engines, and for which a charge of 1*d.* per ton only is made. The fact upon which they rely for their justification of the difference of charge fails them. [ERLE, C. J.—They state positively that the agreement *is* remunerative.] True; but the ground upon which they rest that conclusion is not correctly stated. To justify a difference of charge, the advantage to the railway company must at
*782] least equal the amount of *that difference. Now, the difference in charge for the conveyance of coals from Ruabon to Reading and from Lydney to Reading, is 2*d.* only, though the former distance is 65 miles more than the latter: again, from Lydney to London the distance is 133¼ miles, and from Ruabon to London, 198 miles, and yet the charge for both is 8*s.* 6*d.* per ton, and trucks are charged to the complainants 1*s.* 5*d.*, and to the Ruabon Company 1*s.* only per ton, and yet they have to break the gauge at Wolverhampton. The affidavits do not show a corresponding advantage to the railway company from the lower rates charged to the Ruabon Coal Company, as compared with those charged to the Forest of Dean coal-owners. [ERLE, C. J.—The continuous lead is not the only advantage secured to the Great Western Railway Company by their agreement with the Ruabon Coal Company: they rely also upon the regularity and full train loads. All this was disposed of on the former rule. What you have now to do, is, to show that that decision was come to on imperfect materials.] Upon the whole facts taken together, the statements in all the affidavits, new and old, it is submitted that a case for inquiry is fully made out. [ERLE, C. J.—The old affidavits are disposed of. The only new feature imported into the case, is, that, in the opinion of Messrs. Nicholson, the agreement with the Ruabon Coal Company is not so remunerative to the Great Western Railway Company as to justify their entering into or continuing it.] The amended state of facts necessarily involves very much of what was before the court on the last occasion. The court then held that a difference of charge called for an answer. Whether the remuneration which the company derive from the special agreement be more or less, is not the sole question to be determined. The real question is, whether the excessive charge to the complainants is war-
*783] ranted *by any of the circumstances relied on for its justification by the railway company. Profit and remuneration in the ordinary commercial sense can have no reference to cases arising under this statute, where the only inquiry is whether or not an undue or unreasonable preference is given to one individual over another, or an undue prejudice imposed. In the course of the former argument in this case, Mr. Justice Willes threw out a suggestion that it is for the applicant to make out a primâ facie case of inequality; but that, the primâ facie case being made out, the onus is cast upon the company to justify the charge. *Cur. adv. vult.*

ERLE, C. J.—This rule was in substance an application by the complainants to the court to review the judgment which was given against them in the year 1858,—5 C. B. N. S. 366 (E. C. L. R. vol. 94).

Upon that occasion there was the most ample investigation. Affidavits were filed in reply: questions were referred to the master for report: and judgment was given after full consideration, affirming a principle which has been repeatedly recognised, viz. that a railway company may lawfully make a difference in their rate of charges in

regard to a contract for a large quantity of goods, to be supplied in constant regularity, and to be carried a long distance. Any company may on this ground make an abatement from their prices in proportion to the advantages they derive from the contract, without being liable either for an undue preference or for causing an undue prejudice.

In the judgment it was observed, that, if the complainants had disputed "that the rates charged without agreement are fair and reasonable as compared with the lower rates charged under the special agreement *with the Ruabon Coal Company, regard being had to the different rate of cost of carriage to the railway company, the [*784 court would have felt bound to submit these matters to a detailed investigation by an engineer or traffic manager;" and the complainants renew their application, with many of the former materials, adding their own affidavit disputing the point as suggested in the judgment.

The affidavits in answer give a distinct denial to this affidavit of the complainants. The officers of the company state that the advantages in the contract are found by experience to compensate the abatement in price; and their statement of the fact is corroborated by the opinions of men of skill in railway traffic.

This would be to me a sufficient ground for discharging the rule. But we have been pressed with the argument that Messrs. Nicholson are moving for a reference of the questions arising on the contract, and that such reference may more certainly discover the truth, and therefore should be granted: and, as two of my brethren, for whom I have the highest respect, are of this opinion, I add my reasons for not coinciding with them.

First, I understand the affidavits on both sides so far as to be confident that Messrs. Nicholson's case is answered in fact and in law, unless the principal officers of the defendants and the principal traffic managers of three important railways have sworn falsely. I do not doubt the veracity of these deponents, and I see no reason for putting on them the indignity of referring the question whether they ought to be believed, or on the company the peril of protracted litigation and indefinite risk.

Secondly, the defendants have offered not only the same terms of contract to all persons equally, but also analogous terms for smaller quantities.

*I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power [*785 as free as any merchants, subject only (as to this court) to the duty of acting impartially, without respect of persons: and this duty is performed, when the offer of the contract is made to all who wish to adopt it. Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district: but the power of the railway company to contract is not restricted by these considerations.

If it were necessary to go into the inquiry, I am not satisfied that Lydney can claim the same accommodation as Ruabon because it happens to be on the same railway. The two places are on two distinct branches, situate many miles apart; and the circumstances of the two branches do not appear to me to be the same. Moreover, the first application of the complainants was argued on the ground of disadvantage to them in

competing for traffic to the neighbourhood of London; and particular attention was drawn to Cookham, near Reading. On the second application, they object that the hundred mile clause is an unjust bar to them, because their traffic is for the most part confined to a district nearer home than one hundred miles. If so, all the grievances relating to London and other distant places are unreal: and, if Ruabon coal can be carried up to Didcot and down to the neighbourhood of Gloucester, so as to compete with Lydney coal, it probably is a different article, and in demand irrespective of the price charged for carriage; for, Ruabon coal under those circumstances would pay 7*s.* or 8*s.* per ton, and Lydney coal only 3*s.* or 4*s.* per ton.

It is said in the affidavits that Ruabon is good hearth coal, and Lyd-
*786] ney is in great part good furnace *coal. If this be so, it may account for a different demand. In the Caterham Case, 1 C. B. N. S. 410 (E. C. L. R. vol. 87), the court declared the necessity for caution in controlling rights on so vague a ground as undue disadvantage to others: and certainly extreme caution is necessary in ascertaining that there is a real grievance, requiring a remedy, before the court interferes so as to annul a very important contract, and to destroy very valuable interests, and to take away the power of making any contracts in future with security.

Thirdly, in order to adopt a reference with advantage, it is necessary to decide what is to be referred, to whom, and how he is to make his inquiry, and what is to be the effect of his answer. I think that no practical question can be suggested for reference. The dispute is, whether a certain profit for carrying at seven-sixteenths of a penny per ton per mile is greater than some unknown profit or loss for carrying at eight-sixteenths of a penny per ton per mile. The engine costs a certain sum per day. That cost can be earned only by drawing a weight a distance per day. The Ruabon engine by the contract may be taken to draw 200 tons one hundred miles at seven-sixteenths of a penny, and the cost of the engine may be paid by thirty miles, and then the seventy miles would be the profit. What the Lydney engine is to draw is by the hypothesis uncertain. Messrs. Nicholson and their party refuse to contract, and require to send what they choose, and when they choose,—it may be nothing on one day, fifty tons fifty miles on another day, four hundred tons one hundred miles on another day, and so on. If these be the facts, it seems impossible to tell the proportion which the known sum bears to the unknown. But the advantage derived from a regular supply is not confined to profit from the engine: and a refer-
*787] ence limited to that point would be imperfect. By *regularity, the line may be utilized to the utmost, by arranging time for motion of heavy traffic, and time when the line is to be cleared for fast trains; and all the provisions for deposit and distribution at the terminus of arrival can be used to the most advantage, and the danger of collision and the danger of litigation about delay can be better guarded against. All these latter considerations are a value to the company in their contract; but they cannot be compared, to ascertain it by a reference, without defining the subject to be compared: and, for the reasons above given in respect of the engine, it seems to me that that cannot be done. I would add, that, if a contract was bonâ fide made for profit on each side, and the profit on one side turned out greater

than was expected, I do not think that this court should declare the contract void on such a ground.

Furthermore, supposing the question for reference to be settled, then the difficulty about naming the referee would arise: the parties would not agree; and the court has no judicial knowledge of competency for the office. This duty of deciding was cast on the court as an impartial tribunal of sufficient intelligence; and it ought not to depute that duty to another, unless it could be better performed by him. Where the validity of a contract involving 40,000*l.* per annum to the carriers, and probably more to the coal owners, and 100,000 tons of coal per week to London and its vicinity, is at stake, the danger of bias is very great; and the court has no means of insuring the parties against its effect on a referee. Although the legislature has empowered the court to take advice, I do not think that power would be properly exercised upon the questions raised here.

Furthermore, supposing the question and the referee were settled, then, how is he to inquire? Is it by *reading affidavits? If so, why is not the court as competent to appreciate them? Is it by [*788 examining witnesses? If so, by what authority are they to be examined or sworn? And how are the parties to be represented at the trial? As here, by counsel and attorneys? Or, is it by his own preconceived opinions? If so, would that be satisfactory?

Lastly, if the question, and the referee, and the mode of trial were settled, and the answer is given; what is to be the effect? Is it to bind the court as an award? I should say, certainly not: and, if not, I see no reason why it should be thought superior to the opinion of the traffic managers in the affidavits now before us.

For these reasons, I dissent from the proposal for referring any questions in this case to a referee, and I think the rule should be discharged: but, as the court is equally divided in opinion, the rule drops.

WILLIAMS, J.—I am of opinion that the rule ought to be made absolute for the reference sought. By the 3d section of the statute 17 & 18 Vict. c. 31, under which the rule was obtained, the court is expressly empowered, for the purpose of determining the matters as to which the complaint is made, to direct, in such mode, and by such engineers, barristers, or other persons as they shall think proper, all such inquiries as may be deemed necessary to enable the court to form a just judgment on the matters of complaint.

The present complaint appears to me to call for the exercise of this power, which was doubtless conferred upon the court because it was deemed to be a tribunal unsuited, without such assistance, to dispose of various questions of fact which may be brought before it, of such a nature that men of practical experience in matters of that kind alone can properly inquire into them.

*In the present case, after considering the affidavits, I feel [*789 that certain questions of fact require further investigation in order to decide justly on the matter of the complaints; and I think those questions are of such a nature that no one but a practical man can properly investigate them.

This opinion is fortified by the anxiety of the applicants that the matters should be sent to such an inquiry, and the strenuous resistance

of the company,—seeing that there is no suggestion of insolvency, and that the inquiry must take place at the peril of the applicants being made liable to all the costs of it, if it should turn out that they are in the wrong in asking for it.

I think it right to add, in consequence of what has been said, that it would, in my opinion, go far to frustrate this act of parliament, if the ordinary rule that the court must dismiss the application if the matters on which it is founded are met by counter-affidavits in denial, were to be enforced.

We should not be bound to adopt the report made by the person to whom the investigation was intrusted. We might decline to act on it, if we thought it was founded on any mistake or misapprehension, or was for any other reason unsatisfactory.

On the whole, therefore, I can see no harm which can arise from our granting the inquiry; whilst, by refusing it, my own mind at all events is left in doubt whether we are doing justice; and we are perhaps shutting out such a knowledge of the truth as would altogether reverse our view of the merits of the contest between these parties.

WILLES, J.—In this case I think the reference asked for ought to be made. It is true that the statements in the affidavits of the applicants are vehemently contradicted by the officers of the company and the other *persons whose affidavits they have brought forward: but this, after all, is nothing more than taking issue upon those statements with circumstances the truth of which the applicants have not had the opportunity of contesting. In my opinion it would be unfair to the applicants to decide upon a trial on affidavits, in which the company have the advantage of swearing last as to circumstances within their peculiar knowledge, without any opportunity for cross-examination: and, to insure a proper investigation, we ought to refer it to a traffic manager to determine, upon hearing evidence on each side, with the means of testing its correctness, whether or not the advantages which the company derive from the special contract are fairly worth the difference of charge made; in other words,—to adopt the language of my Brother Crowder, when this case was formerly before this court, 5 C. B. N. S. 439,—whether the rates charged without agreement are fair and reasonable as compared with the lower rates charged under the special agreement with the Ruabon Company, regard being had to the different rate of cost of carriage to the railway company.

*790]

No difference of charge has ever been held justified in this court by the circumstance of its being part of a transaction in which the company has a commercial advantage, if, as is alleged here, they obtain it by an undue preference of the complainant's rivals, or by putting him to an unfair disadvantage.

Upon the affidavits now before the court, an inquiry would unquestionably have been directed upon the former hearing: and, in deciding without it, I cannot but apprehend that the court may unwittingly sanction iniquity.

The court being thus equally divided, the rule dropped.

*BURDETT and Another *v.* LEWIS. *Jan.* 26. [*791

Service of a notice or rule by putting it under the door of the attorney's office, is not good service, without some evidence that it has duly come to hand.

GATES, on a former day in this term, obtained a rule calling upon the plaintiffs to show cause why the verdict in this case, which was tried as an undefended cause at the first sitting at Westminster in this term, should not be set aside, and a new trial had, on the ground that no issue or notice of trial had been delivered,—with costs.

The affidavits upon which the motion was founded,—in which the defendant's attorneys and all their clerks joined,—stated, that, on the 9th of January, one of the deponents accidentally meeting a clerk of the plaintiffs' attorney, was informed by him that he was about to set down the cause for trial for the first sitting in this term, and subsequently recollecting that he had not received the issue and notice of trial, he on his return to his employer's office wrote to the plaintiffs' attorney to say so; that, on the 10th of January, the managing clerk of the plaintiffs' attorney called at the office of the defendant's attorneys, and stated that the issue and notice of trial had been delivered at the office by a lad in the employ of the plaintiffs' attorney *about* 5 *o'clock in the afternoon*, but he did not remember the day of such delivery; that, on the same day, the defendant's attorneys received from the plaintiffs' attorney a letter, in which the latter wrote,—"I am sorry you have not received the issue. From the inquiries I have made, I have no doubt whatever it was duly delivered at your office on the 20th of December. The witnesses are all subpœnaed, and everything ready for trial on Thursday morning; and, being only agent in the matter, I must proceed in pursuance of my notice *of trial,"— [*792 to which letter the defendant's attorneys replied as follows: "If you persist in carrying this cause down to trial, we shall be prepared both by ourselves and our clerks to swear that no issue and notice of trial in this cause has ever been received by us, and shall apply to set aside your judgment, with costs." The deponents then severally swore that they had not received or seen the issue and notice of trial, and averred that if such had ever been delivered in office hours, viz. between half-past nine in the morning and *six o'clock in the evening*, they must have seen it, as they or some of them were in the office the whole day throughout.

R. E. Turner, on a subsequent day, showed cause, upon an affidavit of a clerk in the employ of the plaintiffs' attorney, who swore that he put the issue and notice of trial under the door of the office of the defendant's attorneys *between six and seven o'clock* in the evening of the 20th of December last. He referred to Warren *v.* Thompson, 2 Dowl. N. S. 224, where it was held that service of a rule to compute by putting it through the door of the chambers of the defendant's attorney was sufficient.

Gates, in support of the rule.—Putting a notice or other paper under the door of an attorney's office, is clearly not a proper mode of service. In Strutton *v.* Hawkes, 3 Dowl. P. C. 25, it was held that the service of a rule nisi to compute, by putting it under the door of the defendant's chambers, was not sufficient, although the laundress stated that

the defendant would most probably have the rule in the course of the day. Littledale, J., said: "Putting the rule under the door is not of itself sufficient. It does not appear here that the deponent might not *793] have gone to the *chambers another time and found them open." In Warren v. Thompson, there was a notice on the door directing that all messages might be put through. The rule is thus stated in 1 Arch. Pr., 9th edit., p. 143,—"Service at the chambers of an attorney on his laundress will not suffice, unless she act as his servant, and the affidavit of service state that fact, or the deponent's belief of it, and also his belief that the attorney has received the proceeding. Putting a copy of a rule under the door of the attorney's chambers or place of business (Strutton v. Hawkes), or into a letter-box (Braham v. Sawyer, 1 D. & L. 466), unless there is a notice requesting papers, &c., to be so left (Warren v. Thompson), or unless you ascertain that it has been received, and can swear to the belief of such receipt, will not suffice." [ERLE, C. J.—I certainly have always understood that the service by merely putting the paper under the door was not complete.]

The learned counsel further submitted, that, if there were any doubt as to the practice, he should have an opportunity of filing further affidavits, inasmuch as the affidavits on which he had moved the rule, in consequence of the clerk of the plaintiffs' attorney having stated that the notice was left about five o'clock in the evening, had confined the denial to six o'clock. And he tendered for this purpose an affidavit of the housekeeper,—referring to Wood v. Cox, 16 C. B. 194 (E. C. L. R. vol. 81).

ERLE, C. J.—I think there should be a new trial, the defendant accepting notice for the next sitting, and that the costs should abide the event.

Gates submitted, that, as it was not denied that the defendant's attorneys had been misled by the statement made to them by the clerk of *794] the *plaintiffs' attorney as to the time of the alleged service, he ought to have the costs of his rule.

ERLE, C. J.—We will take the proposed affidavit, and will inquire into the practice, and on the result of our inquiry will depend whether the rule will be made absolute with costs or not. *Cur. adv. vult.*

ERLE, C. J, now said:—Upon inquiry, we find the rule to be perfectly well settled, that service of a notice or rule by putting it under the door of the attorney's office or chambers would be made complete by calling the next morning to ascertain that it had been received, or by some other evidence that it had duly come to hand; but that, without some such evidence, it would not be good service. The defendant, therefore, is entitled to the costs of this rule. But, under the circumstances, we think the proper course will be, to say, that, if the plaintiff obtains a verdict, those costs shall be matter of set-off.

Rule absolute accordingly.

*The WOLVERHAMPTON NEW WATERWORKS COMPANY *v.* HAWKSFORD. *Nov.* 25. [*795

The time within which by the 9th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) a register of shareholders is to be made, is merely directory; and a register containing the several particulars required by the act, and bonâ fide intended to be a register, may be valid though made at a subsequent period.

But the mere placing the name of a party with others as shareholders of a company on a sheet of paper, and sealing it, and calling it a register of shareholders, no shares being numbered or specifically appropriated, and the paper containing none of the essentials required by the act, does not constitute sufficient evidence under the 27th section, of the parties being shareholders.

THIS was an action brought by the Wolverhampton New Waterworks Company to recover from the defendant the sum of 375*l.*, the amount of six several calls of 12*s.* 6*d.* each upon 100 shares of which the defendant was alleged to be the holder, and which calls were respectively made on the 2d of September, 1856, the 1st of February, 1857, the 1st of May, 1857, the 1st of September, 1857, the 5th of January, 1858, and the 11th May, 1858.

The first count of the declaration stated that the defendant was the holder of 100 shares in the Wolverhampton New Waterworks Company, and was indebted to the said company in 375*l.* in respect of six calls of 12*s.* 6*d.* each upon each of the said shares, whereby an action had accrued to the said company, by virtue of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), and the Wolverhampton New Waterworks Act, 1855 (18 & 19 Vict. c. cli.), to demand and have of and from the defendant the sum of 375*l.*: yet the defendant had not yet paid the said sum of 375*l.*, or any part thereof.

There was a second count, to which there was a demurrer: vide 5 C. B. N. S. 703 (E. C. L. R. vol. 94).

Pleas, to the first count, never indebted, and that the defendant was not the holder of the said shares, or any of them, as alleged. Issue thereon.

The cause was tried before Erle, C. J., at the sittings at Westminster after last Trinity Term, when the following evidence was given,—that the plaintiffs were a joint stock company incorporated by an act of *parliament passed on the 16th of July, 1855 (18 & 19 Vict. c. [*796 cli.), in which was incorporated the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); that, by the 14th section of the first-mentioned act, it was enacted that the first general meeting of the company should be held within two months after the passing of that act, and a general meeting of the company should be held in the month of January in every year, or at such other times as should be from time to time appointed by any general meeting; that no other time than the month of January was ever so appointed; that the shares in the plaintiff's company were divided into 20,000 of 5*l.* each; that 100 shares were appropriated by the company for the defendant; that before the act was obtained the defendant executed the subscription contract of the company for 600*l.*; that the defendant, when he executed the subscription contract, gave to the promoters of the company a check for 600*l.*, but that, after the act was obtained, this check was returned to him; that the defendant had voted as a proprietor at a meeting of the

company; and that he was the person mentioned in the 7th and 17th sections of the act.

There was conflicting evidence as to whether the defendant had assented to become a shareholder in the said company; but the jury found that he had previously to the 1st of January, 1857, assented to become the holder of 100 shares: and on that point there was no attempt to disturb the verdict.

It was proved that the first general ordinary meeting of the company was held on the 1st of January, 1857; at which meeting a loose half-sheet of paper was sealed with the seal of the company, and which was in the following form:—

*797] **Darlington Street,*
Wolverhampton.

Mr. Henry Beckett	3	2	6	Pd.	5
J. F. Bateman					200
James Walker	2	10	0	Pd.	4
Mrs. C. S. Symes					5
Mr. C. F. Clark					25
Mr. E. York	25	0	0	Pd.	40
Mr. F. R. Griffiths					50
Mr. J. Holland, jun.	12	10	0	Pd.	20
The Earl of Dartmouth	15	12	6	Pd.	25
Mr. J. Underhill	3	2	6	Pd.	5
Mr. W. Underhill					5
Mr. G. L. Underhill	6	5	0	Pd.	10
The Earl of Powis	12	10	0	Pd.	20
Mr. W. L. Underhill	3	2	6	Pd.	5
Mr. E. Coeser	62	10	0	Pd.	100
Mr. Holyoake	62	10	0	Pd.	100
Mr. S. Leveridge	62	10	0	Pd.	100
Sir F. L. H. Goodricke	62	10	0	Pd.	100
Mr. H. Heane					100
Mr. C. Clark	62	10	0	Pd.	100
Mr. F. Simpson					10
Mr. T. T. Kesteven					50
Mr. W. P. Roebuck					50
Mr. R. S. Key					20
Mr. J. Thorneycroft					100
Mr. J. Sidney					10
Mr. W. Clark					5
Mrs. H. Newbury	31	5	0	Pd.	50
Mr. H. Robertson					200
Mr. T. W. Giffard					20
Miss C. J. Giffard					5
Mr. J. Wyley					10
Mr. J. Durham					50
Miss Augusta Eliza Marshall					5
Mr. F. C. Perry					100
Mr. H. Underhill					100
Mr. J. E. Underhill					50
Mr. Hawksford					100
Mr. S. Edwards					10
Mr. R. Heane					100
					2059

*798] *At this time the shares of the company had not been numbered, nor had any specific shares been appropriated to the defendant.

On the 15th of July, 1857, there was held a general half-yearly meeting of the shareholders of the company, at which a book was produced by the secretary as and for a register of the shareholders therein; and the following is a copy of the only entry in such book which relates to the defendant:—

No. of share.	Amount of call per share paid up.	Name of proprietor.	Addition.	Residence.
2461 to 2560	—	John Hawksford.	—	Wolverhampton.

The seal of the company was at this meeting affixed to this book as the register of shareholders of the company.

On the 27th of January, 1858, there was a general meeting of the shareholders of the company, at which a book was sealed as the register of shareholders, which as far as respects the defendant was in the following form:—

No. of shares.	Amount of calls per share paid up.	Name of proprietor.	Share Numbers.	Residence.
100	Nil.	Hawksford, John.	2461 to 2560	Whpton.

The following calls of 12*s.* 6*d.* per share each were made by the directors of the company upon the defendant,—Six calls of 12*s.* 6*d.* per share on 100 shares in the said company, due respectively the 2d of September, 1856, 1st of February, 1857, 1st of May, 1857, 1st of September, 1857, 5th of January, 1858, and 11th of May, 1858.

*The plaintiffs abandoned the first call at the trial: and it was proved that due notice of all the calls was given to the defendant, and that the time fixed for payment of the several calls had elapsed before the suit. [*799

On the part of the defendant it was submitted that he was upon this evidence entitled to a verdict, on the ground that there was no sealed register within the time required by the company's act; that the paper sealed as a register on the 1st of January, 1857, was not sealed within the time mentioned in the 14th section of the company's act, or the 9th section of the Companies Clauses Consolidation Act, 1845; that the paper sealed as a register on the 15th of July, 1857, was invalid, as not being sealed at any meeting at which it properly could be sealed; and that there was no consent by the defendant to take shares in the company after either of those papers was sealed.

The defendant's counsel further submitted, that, at all events, the defendant was only liable to the call made on the 14th of April, 1858, as the alleged registers of the 1st of January, 1857, and the 15th of July, 1857, were not either of them sealed registers, within the Companies Clauses Consolidation Act, 1845, and the companies act, the provisions of these acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed; or, if the last-mentioned register of the 15th of July, 1857, were not invalid, then that the defendant was only liable to the calls made subsequently to the

15th of July, 1857, as the first register, of the 1st of January, 1857, was invalid on the grounds above stated.

The Lord Chief Justice reserved these points for the opinion of the court; and the jury found a verdict for the plaintiffs for 340*l.* 11*s.* 6*d.*, being the amount of all the calls, with interest, except the first.

*800] **Shee*, Serjt., in the following term, in pursuance of the leave reserved to him at the trial, obtained a rule nisi to enter a verdict for the defendant, "on the ground that the paper first sealed as a register was not sealed within the time limited by the 8 & 9 Vict. c. 16, and the 18 & 19 Vict. c. cli. (the company's act); and that the paper secondly sealed as a register was not sealed at a meeting at which it could be properly sealed under those acts; and that there was no consent by the defendant to take shares after either of those papers was sealed,"—or to reduce the damages to the amount of the calls, with interest, made after the date of the 7th of January, 1858, or to the amount of the calls, and interest, made after the date of the 15th of July, 1857, on the ground that the paper sealed on the 1st of January, 1857, and the paper sealed on the 15th of July, 1857, were not either of them sealed registers within the 8 & 9 Vict. c. 16, and the 18 & 19 Vict. c. cli. (the company's act), the provisions of these acts not having been complied with either in respect of the time of sealing or the contents of the papers so sealed. He referred to the case of The Newry and Enniskillen Railway Company *v.* Edmunds, 2 Exch. 118,† and to the 9th section of the 8 & 9 Vict. c. 16, and the 14th section of the 18 & 19 Vict. c. cli.

Montague Smith, Q. C., and *Mellish*, on a subsequent day in the same term, showed cause.—The jury found that Mr. Hawksford was a shareholder. The register is primâ facie evidence, if perfect, that the parties named therein are shareholders; and, if unanswered, it is conclusive. If the court be satisfied that it is unnecessary to show the defendant to be upon the register provided it be shown aliunde that he is a shareholder, the questions raised by the rule become immaterial. [CROWDER,

*801] J.—Non constat that the jury would have come to *the conclusion that the defendant was a shareholder if the so-called registers had not been put in. The question is whether it is sufficient, to render a party liable for calls, to show him to have assented to be a shareholder, without also showing that his name appears in a valid register.] The 8th section of the 8 & 9 Vict. c. 16, enacts, that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or shall otherwise have become entitled to a share in the company, and whose name shall have been entered on the register of shareholders hereinafter mentioned, shall be deemed a shareholder of the company." It does not follow that a party may not be a shareholder without strictly complying with this, which is a mere enabling clause. The 9th section enacts "that the company shall keep a book, to be called the 'register of shareholders;' and in such book shall be fairly and distinctly entered from time to time the names of the several corporations and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be

placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." In The Newry and Enniskillen Railway Company *v.* Edmunds, 2 Exch. 118,†—where it was held that a purchaser of scrip certificates for shares in a railway company is not liable for calls until his name is inserted on a sealed register of shares,—Parke, B., *says: "By the 8th section of the general act (8 & 9 Vict. c. 16), all persons who have subscribed to the company, or [*802 have otherwise become entitled to a share in it, are to be deemed shareholders, which the interpretation clause explains to mean 'shareholders, proprietors, or members of the company.' Then, by the 9th section, the company are required to enter in a book, to be called 'The register of shareholders,' the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the company. By the 28th section, this register is made primâ facie evidence of a party therein named being a shareholder: it is not, however, conclusive; for, he may, notwithstanding, show that his name has been put there without his consent. By the 27th section, the company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made; that is, a shareholder in the sense of the 8th and 9th sections. The result is, that there is no register until after it is sealed: and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. *Probably that is required both in the case of an original subscriber and a transferee of scrip.* It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." That, however, does not decide the point now before the court. The learned Baron there refers, not to a transferee of shares, but to a transferee of *scrip*. The transfer of shares is provided for by s. 14, which enacts, that, "subject to the regulations herein or in the special act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provision hereinafter *contained, be con- [*803 solidated into capital stock; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated," &c.: and s. 15 provides for the registering of transfers. It is not essential to the power to transfer shares, that the party's name should be on the register. Shares may be transmitted by other means than by transfer; for instance, the 18th section provides, that, "if the interest in any share have become transmitted in consequence of the death or bankruptcy or insolvency of any shareholder, or in consequence of the marriage of any female shareholder, or by any other lawful means than by a transfer according to the provisions of this or the special act, such transmission shall be authenticated by a declaration in writing as hereinafter mentioned, or in such other manner as the directors shall require; and every such declaration shall state the manner in which the party to whom such share shall have been so transmitted, and shall be made and signed by some credible person before a justice, or before a master or master extraordinary of the High Court of Chancery; and such declara-

tion shall be left with the secretary, and thereupon he shall enter the name of the person entitled under such transmission in the register of shareholders; and, until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof." And the 19th section enacts, that, "if such transmission be by virtue of the marriage of a female shareholder, the said declaration shall contain a copy of the register of such marriage, or other particulars of the celebration thereof, and shall declare the identity of the wife with the holder of such share; and, if such transmission have taken place by virtue of any testamentary *instrument, or by intestacy, the probate of the will or the letters of administration, or an official extract therefrom, shall, together with such declaration, be produced to the secretary; and, upon such production, in either of the cases aforesaid, the secretary shall make an entry of the declaration in the said register of transfers." The language of these sections is somewhat inconsistent; the legislature evidently meant the "register of transfers" in s. 18. The 7th section of the special act incorporates the subscribers by name, the defendant being one of them; and in the 19th section he is named as one of the first directors of the company. By the 145th section of the London Grand Junction Railway Act, 6 & 7 W. 4, c. civ., the company were required to cause "the names of the several corporations, and the names and additions of the several persons who shall then be or who shall from time to time thereafter become entitled to shares in the said undertaking, with the number of shares they are respectively entitled to, and the amount of the subscriptions paid thereon, and also the proper number by which every share shall be distinguished, to be fairly and distinctly entered in a book to be kept by the said company, and after such entry made to cause their common seal to be affixed thereto." By s. 147, it is enacted that the company shall, in some proper book to be provided by them for that purpose, "enter and keep a true account of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein. And by s. 152 it is enacted, that, in any action to be brought by the company against any proprietor for the time being of any share in the said undertaking, to recover any money due and payable for or in respect of any call,—"in order to prove that *the defendant was a proprietor of such share in the said undertaking as alleged, the production of the book in which the said company is by this act directed to enter and keep the names and additions of the several proprietors from time to time of shares in the said undertaking, with the number of shares they are respectively entitled to, and of the places of abode of the several proprietors of the said undertaking, and of the several persons and corporations who shall from time to time become proprietors thereof or be entitled to shares therein, shall be primâ facie evidence that such defendant is a proprietor, and of the number and amount of his shares therein." [CROWDER, J.—Is the company bound to register a transfer of scrip certificates?] The argument would undoubtedly be strengthened if it were so. That a shareholder who is not upon the register may transfer, is clear. The business of these compa-

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nies would be very much impeded if it were to be held that no one can be liable to calls who is not registered as a shareholder. The register can only be sealed at the ordinary half-yearly meetings of the company: 8 & 9 Vict. c. 16, s. 64. Suppose a transfer of shares to take place immediately after a meeting, there would be no means of registering it until the next half-yearly meeting. Who then would be liable? The transferor's liability ceases on the delivery of the deed of transfer to the secretary to be registered: s. 15. The 21st section enacts that "the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the company, at such times and places as shall be appointed by the company." Nothing is said there about the party being registered. In The Birkenhead, Lancashire, and Cheshire Junction *Railway Company *v.* Brownrigg, 4 Exch. 426,† the Court of Exchequer seem to assume that there may be other modes of [*806 proof of proprietorship besides the fact of the party's name being on the register.

Assuming that it was essential that the party's name should appear upon a sealed register of shareholders under s. 8, it is submitted that the documents produced afforded abundant evidence of that fact. That a literal and strict compliance with the act is unnecessary, is clear from the case of The London Grand Junction Railway Company *v.* Freeman, 2 Scott N. R. 705, 2 M. & G. 606 (E. C. L. R. vol. 40), where it was held that the book thus referred to and made primâ facie evidence of the proprietorship by the 152d section, was, the book which the company were required by the 145th section to keep; and that a book kept by them, containing the names and additions of all the persons whom the company supposed to be the persons entitled to shares, together with the number of those shares (though not in all cases the amount of subscription paid thereon), and the proper number by which each share was distinguished, and sealed from time to time with the common seal of the company,—was a book substantially kept in compliance with the act, and admissible in evidence, though it contained the names of persons not entitled, and omitted those of others who were entitled to shares, and though there were some entries therein to which there was no seal properly applicable. Lord Denman, in delivering the judgment of the court of error, after referring to the several clauses of the act, says,—"To what book, then, does the 152d section refer when it speaks of *the* book directed to be kept, containing *names*, *additions*, *number of shares*, and *places of abode?* We think it refers to the book in s. 145. It is essential for the purpose of the action for calls that the *names* and *number of shares* should *be shown in evidence: that appears [*807 from the book mentioned in s. 145, and not from that mentioned in s. 147. The place of abode can very rarely, if ever, be important in such actions. One of these two books must have been intended; and, as [that mentioned in] s. 145 is clearly sufficient to show what is wanted to be shown, and the other is not, we think the words in s. 152, as to the places of abode, must be rejected, as being in the nature of a falsa demonstratio, quæ non nocet. If, then, the book referred to in s. 145 be the book which by s. 152 is made primâ facie evidence, the next inquiry is, whether the book which was in fact produced was the book

kept pursuant to the 145th section. Now, the evidence clearly shows it was the book *intended* to be kept under the provisions of that section. It contained the names and additions of all the persons whom *the company supposed* to be the persons entitled to shares, together with the number of those shares, though not in all cases the amount of subscription paid thereon, and also the proper number by which each share was distinguished; and the common seal was from time to time affixed, as required by the section. This appears to us, on principle, as well as on the authority of The Southampton Dock Company *v.* Richards, 1 Scott N. R. 219, 1 M. & G. 448 (E. C. L. R. vol. 39), to be a sufficient compliance with the act to render the book admissible." So, in The Birmingham, Bristol, and Thames Junction Railway Company *v.* Locke, 1 Q. B. 256 (E. C. L. R. vol. 41), the register-book kept in pursuance of the local act (6 & 7 W. 4, c. lxxix.) was held to be primâ facie evidence of the defendant's being a proprietor of shares, although it did not contain the amounts of subscriptions paid on the respective shares. [ERLE, C. J.—There must at all events be a substantial compliance with the statute. You can hardly bring the paper of the 1st of January, 1857, within the principle of those decisions. It does not purport to be *a register, nor does it contain any of the particulars required in s. 9. It seems to have been intended as a mere memorandum.] It must be conceded that there is some difficulty as to that. But the other two, it is submitted, are good. The registers of the 1st of July, 1857, and 27th of January, 1858, were sealed at general half-yearly meetings of the shareholders of the company, and contain the names and residences of the parties, and the number of shares each was entitled to. All that was wanted to make them perfect, was, the amount of the subscriptions. These substantially comply with the provisions of the general and the special act.

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Shee, Serjt., and *Milward*, in support of the rule.—It never has been yet held that a person can be a shareholder in a joint stock company unless he is on the register of shareholders or register of transfers. In The Newry and Enniskillen Railway Company *v.* Edmunds, 2 Exch. 118,† it was expressly decided that a transferee of scrip was not liable for calls until his name had been entered on the sealed register. And Parke, B., says: "No person who was not an original subscriber can be liable as a shareholder, unless his name is on the sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary in this case to say that a transferee is not liable for calls until after his name is entered on a sealed register." That is the nearest approach to an expression of opinion upon the point which is to be found in any of the books. But it is in accordance with the plain common sense of the thing. A man is not a shareholder, either for the purpose of acquiring any rights or of incurring any responsibility, until he is registered. The liability can only be co-extensive with the right acquired. *[ERLE, C. J.—The question is, whether the statute has made registration essential to the party's being a shareholder.] It is submitted that it has. There is a manifest distinction between a proprietorship by act and operation of law and a proprietorship by act of the party,—just as under the ship registry acts. The 6th section of the 8 & 9 Vict. c. 16 provides for the distribution of the capital of the company into shares. The 8th section defines who shall

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be shareholders: it enacts that "every person who shall have subscribed the prescribed sum or upwards to the capital of the company, or who shall otherwise have become entitled to a share in the company, *and whose name shall have been entered on the register of shareholders hereinafter mentioned*, shall be deemed a shareholder of the company." The 9th section describes the book which is to be called the "register of shareholders;" and it enacts, that, "in such book shall be fairly and distinctly entered from time to time the names of the several corporations, and the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the company, and so from time to time at each ordinary meeting of the company." The very form of the certificate shows that the share must be identified with the register. The 14th section enables a *registered shareholder* to transfer his shares; and the 15th section requires the transfer to be registered, and provides *that until the deed of transfer has been delivered to the secretary of the company for the purpose of being registered, the transferor is to remain liable for calls, and the transferee is to claim no dividend. [CROWDER, J.—Who is to be liable for a call made in the interval between the delivery of the transfer to the secretary and the placing the name of the transferee upon the register?] The statute certainly has not said that the vendor shall continue liable; nor does it in terms provide that the vendee shall become so. [ERLE, C. J.—If the transferee is not liable for a call until his name appears on the register of transfers, and the transferor is discharged from the delivery of the transfer to the secretary, how is the company to get the amount of the call?] The only consequence would be that the transferee could not be sued for the call until registered. The call is made upon the shares generally. [WILLIAMS, J.—The call is to be made upon the respective *shareholders*.] In respect of the shares held by them. The 16th section prohibits the making of a transfer until all previous calls have been paid. Until the act of parliament has been obtained, no shares can exist. The signature of the subscription contract has no relation to shares; but is merely required to satisfy the legislature that there is a bonâ fide intention to prosecute the undertaking. It is all preliminary. The defendant, it appears, subscribed for 600*l.*, and the company allot him 100 shares of 5*l.* each. [ERLE, C. J.—When did he become a shareholder? All those things which the jury find constituted him a shareholder took place before any shares were called into existence. The jury have found that the defendant was a holder of 100 shares, if it be possible that he could be a shareholder.] All that he does to constitute him a shareholder took place in August, 1856. Anything which he then did in the way of assenting to become a *shareholder must be taken subject to a due compliance with the provisions of the general and the special acts. He is not to have an [*810 [*811

indefinite liability imposed upon him from the time of the passing of the special act.

The documents put in clearly were not registers within the meaning of the 9th section of the 8 & 9 Vict. c. 16. As to that produced at the meeting of the 1st of January, 1857, it was a mere loose memorandum, and never was intended to be a register at all. It has no one of the requisites of a register. [ERLE, C. J.—We are all agreed about that document.] The document of the 15th of July, 1857, is no better. The meeting which then took place was not one at which it was competent to seal a register. It was not shown to have been a meeting convened pursuant to the 14th section of the special act, which provides that "the first general meeting of the shareholders of the company shall be held within two months after the passing of the act; and a general meeting of the company shall be held in the month of January in every year, or at such other times as shall be from time to time appointed by any general meeting." [ERLE, C. J.—Had there not been any such special appointment?] None appeared. [*Mellish.*—It professes to be an ordinary meeting; and these are regulated by the 64th section of the general act.] It is not competent to the company to hold an ordinary meeting otherwise than in January, unless it be specially appointed at the meeting in January: and of this there was no evidence. In Westoby *v.* The Galvanized Iron Company, 8 Exch. 17,† the defendant obtained an allotment of shares in a joint stock company completely registered under the 8 & 9 Vict. c. 110. He paid the deposit and his name was inserted in the register of shareholders, but he never executed the deed of settlement. The proposed amount of capital was never sub-
*812] scribed, but the company *commenced business with less; and, having become embarrassed, an act of parliament (11 & 12 Vict. c. ciii.) passed for winding up the affairs of the company. This act, after reciting the deed of settlement, and that certain shares were unpaid, empowered the directors to sue for calls, and enacted, that, in such action, the register should be primâ facie evidence of the defendant's being a shareholder, and of the number of his shares, provided that such calls should be made according to the provisions of the deed of settlement, and, as regarded the liability of shareholders, should be deemed to have been made under such provisions; and also provided that nothing in that act contained, except as therein expressly enacted, should render liable to calls any shareholder or other person who would not have been liable thereto if that act had not passed. The defendant having been sued for calls,—it was held, that the private act applied to *shareholders* only, and that the defendant was not liable as a shareholder, inasmuch as he had never executed the deed of settlement.

Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the court:—

Upon this rule, the defendant has raised three questions,—first, whether he is liable for calls made after January, 1857,—secondly, for calls made after July, 1857,—thirdly, for calls made after January, 1858.

As to the first question, the facts proved must be taken to be, that the company had assented to appropriate one hundred shares to the defendant, and that he assented to take them; but no shares had been numbered, and no specific shares had been appropriated. The defend-

ant's name with others had been put *down on a sheet of paper, and this had been sealed as a register of shareholders: but we [*813 have already expressed our opinion that it was not a register, not having any of the essentials required under the act, and not appearing to have been intended to be a register. Upon these facts, we think that the defendant is not liable to the calls made after January, 1857. He is not shown to be the holder of any specific share, within the meaning of s. 27, giving the action for calls; for, the shares of this company were not created within the meaning of that section, but were in process of formation only.

With respect to the calls made after July, 1857, the evidence must be taken to show that the shares had been numbered, and one hundred shares so numbered appropriated to the defendant; and a book had been prepared which purported to be a register of shareholders, and was bonâ fide intended so to be, and which contained all essential requisites. But it appeared to have been sealed at a meeting held in July, 1857; and, as the special act directed the ordinary meetings to be held in January, and as the Companies Clauses Consolidation Act, 1845, authorized ordinary meetings at the time specified in the special act, and at any other times specified in a resolution come to at a general meeting, the objection of the defendant was that this was no register unless there was a resolution at a January meeting authorizing the meeting in July.

In deciding on this objection, we assume that there was no resolution in January authorizing the meeting in July, although, if the point had been more distinctly understood at the trial, the fact might have turned out differently, regard being had to the section (26) defining the proof required from a plaintiff in an action for calls. Thus, the question is raised, whether there can be a holder of a share within the 27th section, *without a register of shareholders authenticated by the seal of the company affixed at an ordinary meeting. This question we [*814 answer in the affirmative. We consider that all requisites to make a shareholder are complied with except the sealing; so that the question is, whether it is impossible to hold a share unless the name of the holder is in a register of shareholders lawfully sealed. We find no such enactment: and, in respect of transferees, we think they may be holders without this requisite; and, although, as above said, the shares must be numbered and specifically appropriated, and this process requires the formation of a book analogous to a register, still it may be done without authentication by sealing at an ordinary meeting.

The argument for the defendant rests on section 8, which describes a shareholder to be, every person who shall have subscribed, &c., or who shall have otherwise become entitled, &c., and whose name shall have been entered on the register of shareholders. This is description rather than definition, as it is clear that a transferee is entitled to a share, and may be a shareholder without his name being on the register of shareholders, if it is on the register of transfers. We think the statute contemplated the process above described of numbering and appropriating, and may well have intended that an inchoate register-book bonâ fide intended to be valid might be taken for this purpose as a register de facto, although not properly sealed; and also that the act probably intended names to be added from time to time in intervals between the meetings for sealing.

There is no decision on the point in respect of an original shareholder; the dictum relating thereto in The Newry and Enniskillin Railway Company *v.* Edmunds, 2 Exch. 118,† is extrajudicial. The principle laid
*815] down in The Southampton Dock Company *v.* *Richards, 1 Scott N. R. 219, 1 M. & G. 448 (E. C. L. R. vol. 39), and adopted in The London Grand Junction Railway Company *v.* Freeman, 2 Scott N. R. 705, 2 M. & G. 606 (E. C. L. R. vol. 40), that a book bonâ fide intended to be a register, though materially defective, should operate as a register in an action for calls, on account of the inconvenience which would arise if a debtor could defeat the claim upon him by resorting to formal defects in the register of shareholders, supports our decision.

For these reasons, we think the defendant is liable to the calls after July, 1857.

With respect to the calls after January, 1858, it was objected that this register, as well as the last, ought to have been made in a shorter time after the passing of the special act. But we are of opinion that the time directed is not an essential condition, and that a register made after that time may be valid.

The rule, therefore, will be absolute, to reduce the verdict by the amount of the calls made before July, 1857, and discharged as to the residue. Rule accordingly.

*816] *THE PENARTH HARBOUR, DOCK, AND RAILWAY COMPANY *v.* THE CARDIFF WATERWORKS COMPANY. *Jan.* 26.

Since the Common Law Procedure Act, 1852 (s. 55), abolishing profert, the court will order inspection of a deed relied on by a defendant in his plea, though it be a disclosure of the defendant's title.

Therefore, where, in an action, for diverting water from a stream, the defendants pleaded a prior grant by the owners of the soil of liberty to take the water, the court allowed the plaintiffs to inspect and take a copy of the deed.

THE declaration stated that the plaintiffs, before and at the time of the committing of the grievances thereinafter mentioned, were possessed of certain lands on both sides of the river Ely, and of the bed of the stream of the river Ely, for the purpose of carrying out the undertaking authorized in and by the Ely Tidal Harbour and Railway Act, 1856; yet the defendants, on divers days and times, wrongfully and unlawfully by divers ways and means took from the said river Ely, higher up in the course of the said river than the said lands of the plaintiffs, divers large quantities of water beyond and in addition to those quantities of water which the defendants were authorized to take from the river Ely under the Cardiff Waterworks Act, 1853, or otherwise howsoever, and used the same for the purpose of supplying with water the inhabitants, buildings, and lands within the limits in the said last-mentioned act mentioned, &c., &c.

Fifth plea, that, before the plaintiffs became possessed of any part of the said lands as in the declaration mentioned, one William Pitt, Earl of Amherst, and one John Drummond, were at one and the same time seised in fee of the said lands and of the other lands, tenements,

and hereditaments thereinafter mentioned, which other lands were on both sides of the said river Ely, and through which other lands the said river flowed, and were seised in fee of the ground, soil, and bed of the river Ely so between the said last-mentioned lands, and of parts of the ground, soil, and bed of the said river Ely adjoining thereto; and the said Earl of Amherst and John Drummond then were *empowered and invested with a power to sell in fee-simple, by the [*817 direction of one Harriet Clive, all the said lands in the declaration alleged to be in possession of the plaintiffs, and all the said other lands, tenements, and hereditaments, and the said parts of the ground, soil, and bed of the said river Ely, as well as all right, title, interest, benefit, and advantage in, to, or arising from the stream of the said river, and the flow thereof, so passing through the said lands so alleged to be in the possession of the plaintiffs, and through the said other lands, and in and upon the said ground, soil, and bed of the said river Ely; and, being so seised and empowered, by a deed dated the 22d of August, 1854, and made between the said Earl of Amherst and John Drummond of the first part, the said Lady Harriet Clive of the second part, and the defendants of the third part, they the said Earl of Amherst and John Drummond, by the direction of the said Lady Harriet Clive, granted, bargained, sold, and released to the defendants and their successors, certain lands, tenements, and hereditaments, and, amongst other things, the said other lands, together with the said ground, soil, and bed of the said part of the said river Ely so between the said other lands, and of the said part so adjoining thereto, and so much of the said river Ely as was so situate between the said lands as aforesaid, and in and upon the said parts of the said ground, soil, and bed of the said river: and the said Earl of Amherst and John Drummond and Lady Harriet Clive by the said deed parted with and granted and conveyed to the defendants all their right, title, interest, benefit, and advantages in, to, or arising from the water of the said river, and the flow thereof, and granted to the defendants an irrevocable license to take and use the waters of the said river in the manner and to the extent mentioned in *the declaration; and the plaintiffs afterwards contracted with [*818 the said Earl of Amherst and John Drummond, that they, by the like direction of the said Lady Harriet Clive, should sell and convey to the plaintiffs and their successors the said land so in possession of the plaintiffs; under and by virtue of which contract, and by the leave and license of the said Earl of Amherst and Lady Harriet Clive afterwards given and granted, the plaintiffs were let into possession and became so possessed of the said lands as in the declaration mentioned, and the plaintiffs have no claim or interest to or in the said lands so in the possession of the plaintiffs, or to their said possession thereof, other than by such supposed right and title subsequent to the said title of the said defendants as aforesaid.

Mellish, on a former day in this term, obtained a rule calling on the defendants to show cause why the plaintiffs should not be allowed to inspect and take a copy of the deed of the 22d of August, 1854, referred to in the fifth plea. The question proposed to be raised, was, whether, where the defendant justifies under a deed, and the plaintiff has no copy of it, the latter is not entitled to have inspection of it for the purpose of replying, though it is no part of the plaintiff's case.

The 55th and 56th sections of the Common Law Procedure Act, 1852, abolishing profert and oyer, and the case of Sim *v.* Edmands, 15 C. B. 240 (E. C. L. R. vol. 80), were cited. [WILLIAMS, J., referred to Webb *v.* Adkins, 14 C. B. 401 (E. C. L. R. vol. 78).]

R. Clarke showed cause.—It may be conceded, that, before the passing of the Common Law Procedure Act, 1852, the defendants must have made profert of the deed in question, and then the plaintiffs would *819] have been entitled to a copy of it. [WILLES, J.—Those *who framed that act were evidently under the impression that in a case like this the opposite party would be entitled to an inspection of the deed referred to at common law.] The framers of an Act of Parliament are not always the persons best fitted to construe it; for, they are too apt to import into its consideration their own preconceived notions of the subject-matter. All that the Common Law Procedure Act has done is, to enact in s. 55, that "it shall not be necessary to make profert of any deed or other document mentioned or relied on in any pleading; and, if profert shall be made, it shall not entitle the opposite party to crave oyer of or set out upon oyer such deed or other document:" and in s. 56, that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out." The intention of the act was, to put an end to a party's having a right as a matter of course to inspect his opponent's title-deeds,—to abolish the distinction which prevailed in this respect between deeds and other instruments. If the document in question had been a mere agreement, the plaintiffs would have had no right to inspect or take a copy of it. [ERLE, C. J.—Unless there was but one copy of it.] And that copy were held under such circumstances as to make the party holding it a trustee for the party seeking to inspect. In general, the rule of law as well as of equity, is, that, if my opponent seeks to attack my title, he must come prepared, and must not rely upon documents in my possession in order to aid him. [ERLE, C. J.—The plaintiffs sue the defendants for diverting from a stream water which ought, as they say, of right to flow to their harbour and works. *820] The defendants set up in answer a *prior right derived from the owners of the soil by deed. Why should not the plaintiffs be at liberty to inspect the deed upon which the defendants rest their justification?] The plaintiffs are seeking a disclosure of the defendants' title, and not merely to compel the production of a document in which they have an interest, or which will aid them in establishing their case. Webb *v.* Adkins, 14 C. B. 401 (E. C. L. R. vol. 78), is a totally different case. [WILLIAMS, J.—That case is an authority to this extent, that the court will take care that a party who would before the Common Law Procedure Act have been entitled to have a deed set out upon oyer, shall not be prejudiced by the abolition of that antiquated form.] Apart from oyer, the court would never impose upon a defendant the hardship of exposing his title to his adversary. In Taylor on Evidence, 3d edit. §§ 1605, 1606, the rule in equity is thus stated: "As in all cases where a discovery of the contents of papers is prayed, the onus is upon the plaintiff to prove his right thereto, and the only evidence on which he can rely is the defendant's *admission*, it follows, that, with a

single exception, to be presently mentioned, a court of equity will not make an order for inspection of documents, unless the plaintiff can show from the defendant's answer, or from his affidavit in the nature of a supplemental answer, first, that the writings in question are in the *possession* of the defendant, and next, that they are *relevant* to his own case, or, in other words, that he has an interest in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent, by showing some specific defect therein. The exception just alluded to is recognised where the defendant, admitting the documents to be in his possession, so incorporates them by general or special reference with his answer as to make *them form a substantial part of it. In this case the plaintiff will be entitled to their production, whether they constitute his [*821 title or the exclusive title of the defendant; because the latter, by thus dealing with the documents, will have waived any objection to their production; and this, too, although in a subsequent part of his answer he should expressly claim the privilege of withholding them, either as forming no part of his opponent's case, or as confidential communications. The same doctrine would apply, if a petitioner were to refer in his petition to a document in his possession. In short, neither party to a suit will be allowed to set out a document in part and then refer to it, and afterwards tell his opponent that he shall not see it, because he himself was not bound originally to furnish any information respecting it. Either he must abstain from referring to any part of it, or he must permit his opponent to examine every part of it." [ERLE, C. J.—That has no very immediate bearing upon the question we have to consider, which is, whether the legislature, in abolishing profert and oyer, did not intend that the party who would have had a copy of a deed referred to in the pleadings before, shall now have an inspection under the common law jurisdiction of the court.] If the legislature had so intended, they would have said so in terms, and would not have left a matter of such importance to speculation and conjecture. The cases of Hardman *v.* Ellames, 2 Mylne & K. 732, and Mackintosh *v.* The Great Western Railway Company, 18 Law J., Ch. 169, show the ground upon which the doctrine of equity rests. In the last-mentioned case, Lord Cottenham says: "Both in this case and in Hardman *v.* Ellames, circumstances existed which, if it had not been for the general reference, would have protected the defendants from producing the documents. In Hardman *v.* Ellames, *the documents went to prove the *defendant's title;* here, the ground is, confidential communications. After a [*822 general reference, the defendant cannot turn round and say, 'I told you something I was not bound to tell you; I will now claim my privilege, and tell you no more.'" In Shadwell *v.* Shadwell, 4 C. B. N. S. 679 (E. C. L. R. vol. 93), in an action against executors upon an agreement under which the plaintiff claimed certain arrears of an annuity alleged to be due to him from the testator, the defendants pleaded, that, after the making of the agreement, and before the accruing of the causes of action, it was agreed between the testator and the plaintiff that the agreement should be, and the same accordingly was, waived and rescinded, and that the testator should be, and he accordingly was, exonerated from all further performance thereof. The court refused to

grant the plaintiff a rule to inspect a supposed letter upon which the plea was founded,—upon a mere affidavit stating that the plaintiff had written some letter to the testator relating to the annuity, the words of which he could not remember, and also his belief that the defendants intended to rely on that letter as constituting the agreement alleged in the plea, but denying that any such agreement was ever made,—*the inspection being sought, not in order to support the plaintiff's own case, but in order to see whether and by what means a defence could be made out against him.* [WILLIAMS, J.—The plea there did not say that the agreement upon which it professed to be founded was in writing.]

Mellish was not called upon to support his rule.

ERLE, C. J.—I am of opinion that this rule must be made absolute. The question is whether or not the plaintiffs are entitled to inspect the deed which is the foundation of the defence set up by the fifth plea, and *823] *of which, if it had been set out upon oyer according to the old practice, he would have had a copy. The Common Law Procedure Act, 1852, having abolished profert and oyer, the question is whether it has taken away the right of the opposite party to have inspection. I am of opinion that the act did not intend to take away the right, but only to abolish the inconvenient proceeding by which inspection was formerly obtained, leaving the right as it was before. It seems to me that there was abundant reason in law for giving inspection in respect of deeds, and for withholding it in respect of parol contracts. In the latter case, the evidence in support of it may be drawn from several different sources: but, where the party pleading relies upon a deed, the opposite party may ascertain by an inspection of it, whether or not it is set out according to its true legal effect, and may at once be satisfied as to whether or not the party pleading it has the right he claims. It seems to me, therefore, that there was abundance of good reason for the law as it stood before the Common Law Procedure Act; and that rule has not in my opinion been abolished. The general principle of equity is laid down in broad terms in Taylor on Evidence, § 1605, that "a court of equity will not make an order for inspection of documents, *unless* the plaintiff can show from the defendant's answer, or from his affidavit in the nature of a supplemental answer, first, that the writings in question are in the possession or power of the defendant, and next that they are relevant to his own case, or, in other words, that he has an interest in their production for the purpose of the trial about to take place, either as affording affirmative evidence of some right or title belonging to him, or as tending to disprove the title or case of his opponent, by showing some specific *824] defect therein." And the doctrine is laid *down in quite as general terms in Daniel's Chancery Practice. All these rules of practice are capable of modification. If the object of the party seeking the inspection appeared to be merely to find a defect in the title of his opponent, the court would mould the rule so as to frustrate such an abuse of its practice. But, as matters stand in this case, I think the old rule ought to apply, and that the plaintiffs should have an opportunity to inspect the deed referred to.

WILLIAMS, J.—I am of the same opinion. Before the passing of the Common Law Procedure Act, 1852, a party to a cause, by reason of the necessity of his opponent's making profert of a *deed* upon which he

relied in pleading, acquired a right to know its contents by claiming oyer. I think it clearly was not the intention of that act, by abolishing profert and oyer, to put parties in a more disadvantageous position in this respect than they stood in before. And, if we find that the abolition of profert and oyer will have that effect in any case, I think we are bound, in exercise of the powers we possess to do justice between suitors in the conduct of the pleadings, to grant inspection. The courts have for a long period been in the habit of allowing parties to inspect and take copies of deeds. This appears from the case of Jevens *v.* Harridge, in 18 Car. 2, 1 Wms. Saund. 9 *d.* From that time to the present it has been the established practice of the court to do so, whenever it has been thought necessary for the equitable conduct of a cause. That being so, I think we are bound to see that the 55th section of the Common Law Procedure Act, 1852, does not deprive a party of the rights he had before, and to grant inspection where it is essential to put him in the position which justice and equity demand. It has been said that there is no distinction in good sense and reason *between the case of a plea relying upon an instrument under seal and [*825 one setting up an agreement not under seal; and that, with respect to agreements not under seal, there is no rule which enables the court to grant inspection. Assuming that to be so, it does not appear to me to be decisive of the question. Before the passing of the Common Law Procedure Act, a party was always entitled to inspect a deed set out in his opponent's pleading: and I think we are bound to take care that he shall not incidentally be prejudiced by a provision which has, diverso intuitu, by abolishing profert, deprived him of that advantage. I do not agree that a different rule prevails where the instrument relied on is not under seal. It is not necessary to give any opinion upon that point: but I wish to guard myself against being understood to give way to the notion that in such a case inspection would not be allowed. I protest against the case of Shadwell *v.* Shadwell being considered as an authority for that position. The plea there did not rely on any agreement in writing at all: the plaintiff sought an inspection, upon a suggestion of the possibility of there being some letter in existence upon which the defendant meant to rely as an agreement. The majority of the court thought it was a mere fishing application, and that the plaintiff had no right to put his opponent to an affidavit in answer. That case, therefore, does not in the least affect the legal question now before us. Where a pleading purports to rely on an agreement not under seal, authorities are to be found to show that the other party may come to the court and under its equitable jurisdiction obtain an inspection of the instrument so relied on.

WILLES, J.—I am entirely of the same opinion. It appears to me that the rule of the common law is *precisely in accordance with what is said by Lord Cottenham in Mackintosh *v.* The Great [*826 Western Railway Company, 18 Law J. Ch. 169, to be the rule in equity; and I think his words may be read with advantage. Speaking of Hardman *v.* Ellames, 2 Mylne & K. 732, his Lordship says: "What took place in that case at the Rolls is not reported: but, according to my recollection, I went upon this ground,—that, when a party sets out a document in part, and then refers to it, he cannot after that tell the plaintiff he shall not see the document, because he (the defendant) was

not bound originally to give any information about it." In that case, therefore, the plaintiff was held to be entitled to inspection because the defendant had made the document a part of his answer, and not because the plaintiff had an interest in it. That dispels a great portion of Mr. *Clarke's* argument. The principle upon which the court of equity proceeds in ordering documents to be produced, is that they are by reference incorporated in the answer, and become a part of it: Evans *v.* Richard, 1 Swanston 7. In Hardman *v.* Ellames, 2 Mylne & K. 758, Lord Commissioner Shadwell says: "It appears, upon a review of the cases, to be perfectly settled, that, where a defendant in his answer states a document shortly or partially, and for the sake of greater caution refers to the document in order to show that the effect of the document has been accurately stated, in such a case the court will order the document to be produced. It was said, in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the defendant's title. It would be a strange thing to say that the defendant should at the hearing have the advantage of other parts of the deed *827] than *those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that, if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit." I apprehend that rule applies to the case of any instrument upon which the plaintiff in his declaration really founds his claim. For this there is authority. In Charnock *v.* Lumley, 5 Scott 438, in an action for money had and received, the court allowed the defendant, after he had pleaded, to inspect and take a copy of an agreement upon which the plaintiff's claim was founded. Tindal, C. J., there says: "This case clearly comes within the spirit, though not within the strict letter of the rule.(*a*) Had the action been founded upon the special agreement, the defendant's right to inspect the agreement could not have been questioned. Although in form this is an action for money had and received, inasmuch as the rights of the parties will be controlled by the agreement, it is in effect the same as if it were brought upon the agreement itself. I therefore think the defendant is entitled to have the inspection." And Vaughan, J., says: "I am also of opinion that this comes within the range of the numerous cases by which I conceived the rule as to the production of documents for inspection was long since settled." So much as to the common law. As to the case Shadwell *v.* Shadwell, 6 C. B. N. S. 679 (E. C. L. R. vol. 95), it hardly becomes me to say anything, as I dissented from *828] *the judgment pronounced by the court. But I would say a word upon the Common Law Procedure Act, 1852. The 55th section, which abolishes profert and oyer, is not the material one, but the 56th, which provides, that "a party pleading in answer to any pleading in which *any document* is mentioned or referred to, shall be at

(*a*) The rule contended for there, was, that the party was entitled to have inspection because there was but one copy of the agreement, because the applicant had an interest in it, and because it was held by the plaintiff as trustee for him.

liberty to set out the whole or such part thereof as may be material." That appears to me to give precisely the same right as the party before had at common law. It gives him the right to set out any document mentioned or referred to in his opponent's pleading,—whether under seal or not,—and, by necessary implication, it gives him a right to apply to the court for inspection and a copy, in order to enable himself to do so. For these reasons, I concur with the rest of the court in thinking that this rule should be made absolute.

Rule absolute.(*a*)

(*a*) In Doe d. Child *v.* Roe, 1 Ellis & B. 297 (E. C. L. R. vol. 72), Lord Campbell says: "This common law jurisdiction of the court is likely in future to be of much greater practical importance than formerly. In a large number of cases to which it would have applied, the necessity for its exercise was superseded by profert. Now that, by the statute 15 & 16 Vict. c. 76, s. 55, the legislature has abolished profert, without providing any substitute, it becomes highly important to lay down the rule, that, where an action is brought on an *instrument*, the court has power to order an inspection of it."

*DAVIES *v.* WESTMACOTT. *Jan.* 26. [*829

To entitle a plaintiff to an order for leave to proceed as if personal service had been effected, under the 17th section of the 15 & 16 Vict. c. 76, where the writ has been served by leaving a copy for him at a club-house of which the defendant is a member, it is not enough to show that the copy has come to his hands. The affidavit should distinctly state that efforts had been made to discover the defendant's place of abode, and that the person seeking to serve the writ had been unable to discover it.

C. POLLOCK moved, under the 17th section of the Common Law Procedure Act, 1852,(*a*) for leave to proceed as if personal service of the writ of summons had been effected.

The writ of summons described the defendant as of "The Junior United Service Club, Charles Street, St. James's;" and the affidavit of the person intrusted with the service of the writ stated, that the deponent attended on the 3d of December last at the Junior United Service Club-house for the purpose of serving the defendant, when he was informed by the hall-porter there that he did not know the defendant's address, but that he had been to the club that morning; that the deponent called several times at the club-house for the purpose of effecting service, but without success; that, on the 6th of December, he delivered to the hall-porter a copy of the writ enclosed in an envelope addressed to the defendant, with a request that it might be delivered to him; that the deponent called *again at the club-house on the 13th of [*830
December, and saw the hall-porter, who informed him that the defendant had been there on the previous Saturday, and that he had given the letter to him; and that, from these circumstances, as well as

(*a*) The 17th section of the 15 & 16 Vict. c. 76, provides, that "the service of the writ of summons, wherever it may be practicable, shall, as heretofore, be personal; but it shall be lawful for the plaintiff to apply from time to time, on affidavit, to the court out of which the writ of summons issued, or to a judge; and, in case it shall appear to such court or judge that reasonable efforts have been made to effect personal service, and either that the writ has come to the knowledge of the defendant, or that he wilfully evades service of the same, and has not appeared thereto, it shall be lawful for such court or judge to order that the plaintiff be at liberty to proceed as if personal service had been effected, subject to such conditions as to the court or judge may seem fit."

from a letter which the defendant had sent to the plaintiff's attorneys, the deponent believed that the writ had come to the knowledge of the defendant. The letter referred to was as follows:—

"J. U. S. Club, Dec. 12th, 1859.

"Gentlemen,—Upon visiting the club this day, after an absence of some time, it was with much surprise I found a letter from your office, enclosing a writ on account of Mr. Davies's bill. I called at your office, and thought I had fully explained my present position, &c., &c.

"R. M. WESTMACOTT."

An application for leave to proceed, founded upon this affidavit, had previously (on the 20th of December, 1859), been made to Williams, J., at Chambers, without success; that learned judge being of opinion that the affidavit did not sufficiently show that reasonable efforts had been made to discover the defendant's residence.

Pollock submitted that there was enough upon the face of the affidavit to satisfy the court that the writ had duly come to the defendant's hands. [WILLIAMS, J.—Every word in the affidavit may be true, and yet the process-server might without any difficulty have ascertained the defendant's dwelling. WILLES, J.—It is a very offensive thing to serve a writ upon a defendant at his club-house, and ought not to be tolerated without a very sufficient reason.]

ERLE, C. J.—I am of opinion that we ought not to interfere in these cases unless we see clearly that the *affidavit is such as ought to have satisfied *the judge* that the person employed to serve the writ had done all that could reasonably be expected of him to serve the defendant personally or to ascertain his dwelling-place. All that appears upon this affidavit, is, that he called on the 3d of December at the defendant's club-house and asked the hall-porter for his address, and that on the 6th he left a copy of the writ there for him enclosed in an envelope, which seems to have reached the defendant's hands; and on the 20th application is made to the learned judge for leave to proceed as if personal service had been effected. I think the learned judge was quite right in refusing the application. I should not have been satisfied with such an affidavit. The deponent should have shown that he had made some reasonable exertion to discover the defendant's dwelling. As this is a course which very much increases the expense, I think it is a very salutable rule of practice to hold these affidavits to great strictness.

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WILLES, J.—I am of the same opinion. I proceed upon the ground that there is no statement in the affidavit that the defendant's residence was unknown, or that any inquiry had been made to discover it, or that it might not readily have been ascertained by a little exertion.

The rest of the court concurring, Rule refused.

*JONES *v.* JONES. *Jan.* 28. [*832

A cause was referred by judge's order before verdict,—*the costs of the cause and of the reference and award to abide the event:* the arbitrator found for the plaintiff upon certain issues, damages 12*l.* 12*s.*, and that there was due to the defendant on a plea of set-off 9*l.* 7*s.* 9*d.*; and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3*l.* 4*s.* 3*d.*:—Held, that the event of the cause being in favour of the plaintiff, he was entitled to the costs.

THIS was an action brought by the plaintiff in the county court of Flintshire to recover a balance of 41*l.* 12*s.* The cause having been removed into this court by certiorari at the instance of the defendant, the plaintiff declared for money had and received and for money due upon an account stated. The defendant pleaded,—first, never indebted,—secondly, payment before action,—thirdly, set-off,—fourthly, a sale by unlawful weights and measures.

By a judge's order, made by consent, the cause was referred to an arbitrator,—the costs of the cause, and of the reference and award, to abide the event. The arbitrator by his award found that 12*l.* 12*s.* were due from the defendant to the plaintiff upon the issue on never indebted, and that there was due from the plaintiff to the defendant 9*l.* 7*s.* 9*d.* on the plea of set-off. The second and fourth issues were found for the plaintiff: and the arbitrator ordered that the difference, 3*l.* 4*s.* 3*d.*, should be paid by the defendant to the plaintiff forthwith.

The plaintiff afterwards applied to a judge at Chambers for an order for costs, and the learned judge (Byles, J.) made an order that the plaintiff should have the costs of the reference and award, but not the costs of the cause.

J. Brown, on a former day, obtained a rule calling upon the defendant to show cause why the master should not be at liberty to tax the plaintiff his costs of the cause, and why the order of Byles, J., should not be amended in that respect. He referred to the 13 & 14 Vict. c. 61, ss. 11, 12, 15 & 16 Vict. c. 54, s. 4, *and the 19 & 20 Vict. c. 108, s. 30, and to the case of Day *v.* Mearns, 1 Chitt. Rep. [*833 156.

Morgan Lloyd now showed cause.—The defendant, under the 39th section of the 19 & 20 Vict. c. 108, objected to the cause being tried in the county court, and accordingly it was moved by certiorari into this court; and, upon the reference, the arbitrator found no part of the claim which the plaintiff made in the county court in his favour. [ERLE, C. J.—The certiorari gave the plaintiff the right of joining any cause of action he pleased when he came to declare here. WILLIAMS, J.—The question is, whether the event of the cause is not in favour of the plaintiff. Wigens *v.* Cook, 6 C. B. N. S. 784 (E. C. L. R. vol. 95), is against you. There the declaration contained seven counts, one of which was a count in trover for two deeds and two authorities for the delivery of deeds. By an order of Nisi Prius, it was agreed that the record should be withdrawn, and the cause and all matters in difference be referred to an arbitrator, who was to have "all the powers as to certifying of a judge at Nisi Prius,"—the costs of the cause to abide the event of the award, and the costs of the reference and award to be in the discretion of the arbitrator. The arbitrator made his award in favour of the plaintiff as to the two authorities referred to in the cou[r]

in trover, with a farthing damages, and found all the other issues for the defendant; and he gave the defendant the costs of the reference and award; and this court held, that, as the event of the award was in favour of the plaintiff, he was entitled to the costs of the cause,—the 3 & 4 Vict. c. 24, s. 2, being inapplicable, inasmuch as there was no *verdict.*] The language of the order here is different. The question is, what is the event of the cause as it originally stood. [ERLE, C. J.—
*834] Strike out "as it originally stood," and the *event is in favour of the plaintiff.] Cooper *v.* Pegg, 16 C. B. 454 (E. C. L. R. vol. 81), is more like this case. There, by an order of reference in an action for an injury to the plaintiff's reversion by making a drain into his premises, a verdict was directed to be entered for the plaintiff, claim 500*l.*, costs 40*s.*, subject to the award of a barrister, to whom the cause and all matters in difference were referred, and who was empowered to direct a verdict for the plaintiff or the defendant as he should think proper,—the arbitrator to have all the same powers as the court or a judge sitting at Nisi Prius, and the costs of the suit *to abide the event of the award.* The arbitrator by his award found all the issues in the action in favour of the plaintiff except the first, and that he found partly for the plaintiff and partly for the defendant; and he further directed that the verdict entered for the plaintiff should stand, but that the damages should be reduced to a farthing; and he further ordered the defendant to pay the plaintiff 5*l.*, and that the plaintiff should at his own expense make a certain drain: and the court held that the plaintiff was not, in the absence of a certificate under the 3 & 4 Vict. c. 24, s. 2, entitled to the costs of the cause. [WILLIAMS, J.—There, the arbitrator was substituted for the jury.]

Brown, contrà, was not called upon.

ERLE, C. J.—I am of opinion that this rule must be made absolute. The event of the action is in favour of the plaintiff, and the costs are consequently due to him by the terms of the reference. The enactment in the County Court Act, 13 & 14 Vict. c. 61, s. 11, has no application to the case of a sum given by an award made under a reference with a stipulation that the costs of the cause shall abide the event. The case
*835] of *Wigens *v.* Cook, 6 C. B. N. S. 784 (E. C. L. R. vol. 95), though not identical in its circumstances, in principle governs this case. The plaintiff is clearly entitled to his costs of the cause, and the order of my Brother Byles must be amended accordingly. But, as this is an appeal against a decision of a judge at Chambers, and we think the defendant was justified in taking the opinion of the court, the rule will be absolute without costs.

WILLIAMS, J., and WILLES, J., concurring,

Rule absolute accordingly (a)

(a) See the 23 & 24 Vict. c. 126, s. 34, ante, p. 560, note.

DURIE *v.* HOPWOOD. *Jan.* 27.

The court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there be some great and obvious preponderance of conveniance in trying the cause elsewhere.

Therefore, in an action for the breach of a warranty on a sale of horses at Liverpool, the court refused to change the venue from Middlesex to South Lancashire, upon affidavits stating that the defendant's witnesses all resided at Liverpool and in Ireland,—the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid.

THIS was an action for a breach of warranty on a sale of two horses bought of the defendant, a dealer at Liverpool, for the price of 134*l.* 10*s.* There was a plea denying the unsoundness.

Edward James, Q. C., after an unsuccessful attempt had been made at Chambers, moved for a rule nisi to change the venue from Middlesex to South Lancashire, upon affidavits showing that the cause of action arose at Liverpool and not elsewhere, and that the defendant had material and necessary witnesses all residing there and in Ireland. [ERLE, C. J.—It is important that a *cause should be tried where the cause of action arose: and I think it is advisable to act upon [*836 that principle so far as the interests of justice can be made to coincide with that course.]

Edwin James, Q. C., and *Needham* showed cause.—According to the old practice, the plaintiff had the option of laying the venue where he pleased; the defendant might always remove it upon an affidavit that the cause of action arose in the county to which the venue was sought to be moved, and not elsewhere; and the plaintiff might come and have it restored upon an undertaking to give material evidence in the original county. Now, it is entirely in the discretion of the court to order the venue to be changed where the substantial interests of justice require it. Here, the inconvenience of a trial at Liverpool would be very great, seeing that the plaintiff's witnesses, veterinary surgeons and others, are all residing in or near London, and the expense of their conveyance to and detention at Liverpool would be very great. Besides, the cause has been already entered for trial by a special jury at the sittings in Middlesex after this term, and notice of trial given. A further answer to the application is, that there has been unreasonable delay. Issue was joined on the 2d instant; no application to change the venue was made until the 11th, when a summons was taken out to be heard before Byles, J., on the 13th; and this rule was not moved for until the 19th. A previous application had been made at Chambers on the 21st of December last.

Edward James, Q. C., in support of the rule.—The only question at issue between the parties was as to the soundness or unsoundness of the horses,—whether at the time of the sale on the 14th of October, 1859, at *Liverpool, the horses were sound. [ERLE, C. J.—We are always most anxious that causes shall if possible be tried where [*837 the matter in contest arose. We are against you also on the ground of delay: the defendant first applies to a judge at Chambers on the 21st of December, and again on the 13th of January; and he afterwards delays his application to the court until the 19th.] The delay is only from the 13th to the 19th of January.

ERLE, C. J.—This is not a case in which I feel justified in interfering

to prevent the plaintiff from trying his cause in the county in which he has elected to lay the venue. I therefore think the rule should be discharged, the costs of the motion to be plaintiff's costs in the cause.

WILLES, J.—In Helliwell v. Hobson, 3 C. B. N. S. 761 (E. C. L. R. vol. 91), it was held that the court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. When the question arises again perhaps that case may require some consideration.

The rest of the court concurring,

Rule discharged accordingly.

*838] *GLEAVES v. MARY PARFITT, Executrix of PETER LEWIS PARFITT, deceased.

A vicar choral of the cathedral church of Wells, in the county of Somerset, is a "corporation sole," and his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar choral.

And, even if he were not strictly a "corporation sole,"—*Semble*, per Erle, C. J., that he still has such a sole estate in the house as to create the liability.

THIS was an action brought against the executrix of a deceased vicar choral of the cathedral church of Wells, in the county of Somerset, for dilapidations of a house and premises in the Vicars' Close, which the deceased as such vicar choral had occupied during his lifetime and down to the time of his death. The plaintiff was the successor of the deceased in the vicarship.

The declaration stated, that all and singular the prebendaries, rectors, and vicars of England for the time being are bound to sustain and repair all and singular the houses and edifices belonging to their prebendaries, rectories, vicarages or vicarships, and to leave the same so sustained and repaired to their successors; that the testator, during his lifetime, and at the time of his death, was vicar, that is to say, a vicar choral of the cathedral church of St. Andrew, in Wells, in the diocese of Bath and Wells, in the county of Somerset; that while he was such vicar, he was seised in right of his said vicarage or vicarship of a certain dwelling-house and edifices belonging to the said vicarage or vicarship, which he ought to have sustained and repaired, and to have left the same so sustained and repaired to his successors, being vicars as aforesaid of the said cathedral church, and seised in succession to him, in right of the vicarage or vicarship, of the said dwelling-house and edifices; that the testator, while he was so seised, died; that the plaintiff, who during the life of the testator had been duly presented, nominated, admitted, and instituted, and had become and was a vicar as aforesaid of the said cathedral church, was after the death of the testator duly inducted and

*839] collated into, and became and was seised *in succession to the said testator, in right of the said vicarage or vicarship of the plaintiff, of the said dwelling-house and edifices, and the next successor of the said testator of and to the same; yet that the said testator, while he was such vicar and so seised, wasted, spoiled, and destroyed the said

dwelling-house and edifices, and at the time of his death the dwelling-house and edifices were not repaired and sustained, and were out of repair and dilapidated, and were so left by the testator at his death to the plaintiff as and being such successor to him as aforesaid; and that the sums of money then and still necessary for the due repairing of the same dwelling-house and edifices amounted and still amount to the sum of 88*l.* 2*s.* 8*d.*

Pleas,—first, not guilty,—secondly, that the said testator while he was such vicar was not seised in right of his said vicarage or vicarship of the said dwelling-house and edifices, or any of them, belonging to the said vicarage or vicarship, as alleged,—thirdly, that the said testator ought not to have sustained and repaired the said dwelling-house and edifices, or any of them, and to have left the same or any of them so sustained or repaired to his successors, being vicars as aforesaid of the said cathedral church, and seised in succession to him, in right of the said vicarage or vicarship, of the said dwelling-house and edifices, as alleged.

The cause was tried before Bramwell, B., at the last Summer Assizes at Wells. It appeared that the title of the vicars choral was regulated by certain documents which were produced in evidence, viz. a charter of King Edward the Third, in 1347,—a grant by the then Bishop of Bath and Wells, dated in the year 1420, with confirmations by the dean and chapter of Wells and by the prior and chapter of Bath,—the statutes of the founder,—a charter of Queen Elizabeth,—and a collation by the bishop of a vicar choral to a house.

*The charter of Edward the Third granted that the bishop may assign to the vicars choral a certain place of the soil of the church of St. Andrew in Wells, and of the bishop of the same place, to have and to hold to them and their successors, vicars choral, for their habitation, and that the bishop may charge his lands with two annuities in augmentation of the sustenance of the said vicars, and of divine service,—with a license to the vicars choral to receive in mortmain. [*840

The grant of the bishop of Bath and Wells assigned the same land, together with the houses in the same place by us newly built and to be built, "to the use of our vicars of our church aforesaid, under this manner and form, that is to say, every chamber, with its appurtenances, to be had and enjoyed so long as they shall be vicars of the same church, and make their personal abode in the same, so that it shall be to us and our successors to confer and assign the said chambers when they shall be void to such vicars of the said church as shall please us, at the free will of us and our successors, and that the vicars not residing in their chambers shall be deprived." It further ordained that the vicars of the said church inhabiting the said chambers and living together at meat and drink might have to their common use the hall, &c. It then granted to the vicars choral two annuities, "to have and to hold to the said vicars inhabiting the said chambers, and living together as aforesaid." Lastly, it ordained that every vicar shall say the Lord's prayer and the Salutation of the Angel for the bishop and his successors every time he shall pass to or from the church of St. Andrew.

From the statutes of the founder, regulating the vicars choral, it appeared, amongst other things, that each vicar had the duty of keeping the house he inhabited in repair.

*841] *The charter of Elizabeth, reciting doubts about the incorporation, incorporates the vicars choral, and grants that the corporation may receive, appropriate, and have the common lands, tenements, &c. It then provides for filling up vacancies by the dean and chapter, subject to rejection by the corporation; and, after a year of probation, the new vicar is to be admitted and instituted to the perpetuities of the vicarship, to hold for life, and all the place, privileges, hereditaments, &c., as his last predecessor or incumbent of the same vicarship therebefore had or held. It further provides that the corporation, during vacancy of a vicarship, may hold such vicarship, and all the proceeds and profits to such vicarship belonging or appertaining; and then it grants to the corporation all that college, close, or mansion-house which the vicars choral now possess, and all the buildings to the college belonging. It then commands obedience to the statutes of the founder, and ordains that the bishop for ever shall have all jurisdictions, authorities, powers of visiting and doing other things belonging to the office of bishop, and also the patronage, placing, donation, and collation of the houses within the college, in as ample manner as the founder or any of his predecessors ever had.

The collation of the vicar was conditioned for continuance as vicar, and for inhabitancy, and for repair, and gave the vicar an estate in severalty therein.

Of late years the number of vicars choral in the cathedral church of Wells has been eleven, two of whom are priests, the rest lay vicars. When a vacancy occurred amongst the vicars choral, his successor was nominated by the dean and chapter, and, after one year of probation, if approved, he became vicar perpetuate; and, if a house were vacant, the bishop collated him thereto at his discretion. The widow of a *842] *deceased vicar was allowed to remain in the house for twelve months after the death of the vicar.

The Rev. Peter Lewis Parfitt was nominated a (priest) vicar choral in October, 1801, and became vicar perpetuate in October, 1802. He subsequently took a house, and was collated thereto, and continued in possession down to the time of his death in 1857.

The plaintiff became a lay vicar on the 1st of April, 1851, and vicar perpetuate on the 1st of April, 1852. After the death of the Rev. Peter Lewis Parfitt, he was collated to the house which had down to the time of his death been occupied by him.

On the part of the defendant it was insisted that the preferment in question was not a "benefice" so as to render the representative of a deceased vicar choral liable to the successor for dilapidations; and that, even if it were a "benefice," the plaintiff was not a *successor* to the office which had been held by the Rev. Mr. Parfitt, and therefore his situation was in no way altered by his death.

Under the direction of the learned baron, a verdict was found for the plaintiff for 74*l.* 10*s.* 10*d.*, the amount of dilapidations proved; and leave was reserved to the defendant to move to enter a verdict for him, if the court should think the action not maintainable.

Kinglake, Serjt., in Michaelmas Term last, obtained a rule nisi accordingly, and also to arrest the judgment. He referred to Wise *v.* Metcalf, 10 B. & C. 299 (E. C. L. R. vol. 21), 5 M. & R. 235; Burn's

Ecclesiastical Law, title *Dilapidations*, p. 148, and Digge's Parson's Counsellor, p. 94.

Montague Smith, Q. C., and *Bullar*, showed cause, contending that vicars choral were a corporation sole as much as a prebendary or other spiritual person, and *liable by the common law for dilapidations. [*843 The following authorities were referred to:—Dr. Sand's Case, Skinner 121; Salkard *v.* Beckwith, 1 Lutw. 116; Anonymous, 2 Vent. 349; Sellers *v.* Lawrence, Willes 413; Weldon *v.* Green, 2 Burn's Eccl. Law 55; Radcliffe *v.* D'Oyley, 2 T. R. 630; Repton *v.* Hodgson, 7 Q. B. 84, 96 (E. C. L. R. vol. 53); Mason *v.* Lambert, 12 Q. B. 795 (E. C. L. R. vol. 64); Bryan *v.* Clay, 1 Ellis & B. 38 (E. C. L. R. vol. 72); 2 Gibson's Codex, p. 143; Co. Litt. 4 a; 1 Burn's Ecclesiastical Law, p. 284; 2 Burn's Ecclesiastical Law, pp. 88, 89, 150; and the statutes 13 Eliz. c. 10, and 1 G. 1, stat. 2, c. 10.

Kinglake, Serjt., and *Karslake*, in support of the rule, submitted that a vicar choral is not a corporation sole, not being endowed as such or seised of any particular house in right of his vicarage, but the whole property being vested in the aggregate corporation of the vicars choral; and that the liability for dilapidations is limited to the case of a *spiritual* corporation sole. They referred to Dr. Sand's Case, Skinner 121; Salkard *v.* Beckwith, 1 Lutw. 116; Jones *v.* Hill, 3 Levinz 268; Browne *v.* Ramsden, 8 Taunt. 559 (E. C. L. R. vol. 4), 2 J. B. Moore 612 (E. C. L. R. vol. 4); Wise *v.* Metcalf, 10 B. & C. 299 (E. C. L. R. vol. 21), 5 M. & R. 235; Bird *v.* Relph, 2 Ad. & E. 773 (E. C. L. R. vol. 29), 4 N. & M. 876 (E. C. L. R. vol. 30); Shaw *v.* Woods, 5 Irish Com. Law Rep. 156; Heath, app., Haynes, resp., 3 C. B. N. S. 389 (E. C. L. R. vol. 91); 1 Kean & G. 99, 2 Roll. Abr. *Parson* (A), *Vicaridge*, *Constitutions of Othobon;* 2 Gibson's Codex 751; Watson's Clergyman's Law, c. 38; Digge's Parson's Counsellor 138, pl. 94; Cripps's Laws of the Clergy 127; 1 Burn's Ecclesiastical Law, *Appropriation*, p. 76, *Benefice*, p. 136, *Dilapidations*, p. 148; 2 Burn's Ecclesiastical Law, p. 92; 3 Stephen's Commentaries, 4th edit., Book iv., Part iii., c. i., p. 127; and the statute 13 Eliz. c. 10. *Cur. adv. vult.*

*Erle, C. J., now delivered the judgment of the court:— [*844

In this case the question has been whether a vicar choral of Wells succeeding to one of the houses of the vicars choral under the circumstances after mentioned, can sue the representative of his predecessor in that house for dilapidations.

It was conceded by the defendant, that, if vicars choral were sole corporations, as rectors, vicars, and prebendaries are, the action would lie: but she contended that the vicars choral are a corporation aggregate, and that the houses belonged to that corporation, and that each vicar choral had no greater interest in one of the houses than a fellow of a college has in his chambers, and has no other liability.

But we are all of opinion that a vicar choral is a corporation sole: and I am further of opinion, that, if he is not, he still takes such a sole estate in the house as to make him or his representatives liable.

The title of each vicar succeeding to a house appears by the documents in evidence. The first is a charter of Edward the Third (of 1347), which, after reciting an inquisition on an ad quod damnum, grants that the bishop may assign to the vicars choral a certain place of the soil of the Church of St. Andrew in Wells, and of the bishop of

the same place, to have and to hold to them and their successors, vicars choral, for their habitation, and that the bishop may charge his lands with two annuities in augmentation of the sustenance of the said vicars choral and of divine service, with a license to the vicars choral to receive in mortmain.

This charter proves that the vicars choral were a spiritual corporation aggregate, and therefore capable of receiving property by appropriation or otherwise.

The second document is a grant by the bishop, with separate confirmations, the one by the Dean and *Chapter of Wells, and the
*845] other by the Prior and Chapter of Bath, which assigns the same land, together with the houses in the same place by us newly built and to be built, to the use of our vicars of our church aforesaid, under this manner and form, that is to say, *every chamber* with its appurtenances to be had and enjoyed so long as they shall be vicars of the same church and make their personal abode in the same, so that it shall be to us and our successors to confer and assign the said chambers when they shall be void to such vicars of the said church as shall please us, at the free will of us and our successors; and that the vicars not residing in their chambers shall be deprived. It also ordains that the vicars choral of the said church inhabiting the said chambers and living together at meat and drink, may have to *their common use* the hall, the kitchen, the bake-house, and all other houses in the same place. It then grants to the vicars choral two annuities, to have and to hold to said vicars inhabiting said chambers and living together as aforesaid. And, lastly, it ordains that every vicar shall say the Lord's Prayer and the Salutation of the Angel for the bishop and his successors every time he shall pass to or from the Church of St. Andrew.

This instrument must be construed according to the laws ecclesiastical relating to appropriations to and endowments of spiritual bodies, and not according to the rules of the common law relating to the conveyance of freeholds, either absolutely or to uses and trusts. The corporation aggregate takes the property in the houses, &c., granted in common, but takes no other interest in the chambers there than the right to claim that the bishop shall collate one of their body whom he may choose to each chamber as it becomes vacant. Each vicar who is collated to a
*846] chamber must be a member of the corporation *aggregate while he holds the chamber; but he takes nothing by being such member, without collation by the bishop. After collation, he holds in severalty a spiritual benefice without cure of souls. There is a corporate succession in the holding as it passes from one corporator to another; but each corporator holds in severalty.

The third document in evidence contained the statutes of the founder regulating the vicars choral. It appears from them, among other things, that each vicar had the duty of keeping the house he inhabited in repair.

The fourth document is the charter of Elizabeth, which, reciting doubts about the corporation, incorporates the vicars choral, and grants that the corporation may receive, appropriate, and have the commons, lands, tenements, pannages, &c. It then provides for filling up vacancies by the dean and chapter, subject to rejection by the corporation; and, after a year of probation, the new vicar is to be admitted and insti-

tuted to the perpetuities of the vicarship, to hold for life, and all the place, privileges, hereditaments, &c., as his last predecessor or incumbent of the same vicarship therebefore had or held. It then provides that the corporation during vacancy of a vicarship may hold such vicarship and all the proceeds and profits to such vicarship belonging or appertaining. It then grants to the corporation all that college, close, or mansion-house which the vicars choral now possess, and all the buildings to the college belonging. It then commands obedience to the statutes of the founder, and ordains that the bishop for ever shall have all jurisdictions, authorities, powers of visiting and doing other things belonging to the office of bishop, and also the patronage, placing, donation, and collation of the houses within the college in as ample manner as the founder or any of his predecessors ever had.

*This charter appears to have been intended to give express legal confirmation to many matters affecting the corporation [*847 theretofore depending upon custom. It confirms the right of the bishop to collate to the houses, and the duties created by the statutes of the founder, and therefore the duty of each vicar to repair the house he inhabits. It uses language denoting that each vicarship was a corporation sole for some purposes; and it subjects the whole to the jurisdiction of the bishop.

The fifth document was, a collation by the bishop of a vicar to a house conditioned for continuance as vicar, and for inhabitancy, and for repair, and giving an estate in severalty therein, derived from the bishop, not from the corporation, though the donee must be qualified by being a corporator. This document, together with the clauses of the charter above recited speaking of the incumbents of the vicarships taking in succession, is good ground for deciding that each vicar takes the house as annexed to his vicarship as a sole corporation, by the act of the bishop, and therefore for holding that the plaintiff is entitled to recover; and on this ground all my Brethren concur in judgment for the plaintiff.

But I am further of opinion, that, if each vicar is not a corporation sole, the custom appears to extend to a house so taken by a member of a spiritual corporation, bound in duty to repair, and subject to ecclesiastical jurisdiction if he neglected his duties.

In Jones *v.* Hill, 3 Levinz 268, it was held, that, by custom, the rule of the ecclesiastical courts as to dilapidations, &c., had been adopted at common law: and the documents above recited expressly create the duty, and give the bishop jurisdiction to enforce it. The existence of a corporation sole does not seem to me essential for the application of the custom. It is true *that it has most frequently been in fact [*848 applied in the case of spiritual corporations sole; but such application is accidental, not essential. It is confined to spiritual corporations, because tenants for life of estates created according to temporal law are regulated either by known incidents attached by law to their estates, as in the case of dower or courtesy, or according to the will of the grantor where created through his will. It is brought to bear for the most part on corporations sole among spiritual corporations, because there can be no succession in the case of property held and occupied by a corporation aggregate; but there are cases where a member of a corporation aggregate is qualified because he is a corporator, to take a freehold estate in severalty in property appropriated or granted to the corpor-

tion aggregate. In these cases, the reason for the application of the custom is the same as in the case of corporations sole. The words evidencing the applicability of the custom are extensive enough to comprise them; and, where the case has been brought into judgment, the decision has been that the custom applies.

The facts of the present case exemplify the reason for the application of the custom. The late tenant for life was guilty of a clear breach of express duty, according to the grant of his estate: he has left in his assets the profits of his wrong; and, unless the defendant is answerable out of those assets, the loss from the wrong will be thrown on the plaintiff. It is clear that in reason the plaintiff has good right to recover from the defendant.

As to the evidence by which the application of the custom is to be tested, I notice those authorities cited in the argument which are to be found in Burn's Ecclesiastical Law, and observe generally that none
*849] expressly excludes from the custom the property of a *corporation aggregate held by a corporator in severalty, and none gives any reason for the custom leading to such a conclusion.

Taking the authorities from 2 Burn 146, title *Dilapidations*,—The rule of Archbishop Edmund expresses that a rector shall be liable: but there the word "rector" is for example only, and is to be extended by construction, as the statute relating to the warden of the Fleet has been applied by construction to all gaolers. The constitution of Othobon recites the mischief from the avarice of divers persons (quemdam), and ordains that all *clerks* shall repair: this has no reference to a corporation sole. The 13 Eliz. c. 10, in its recital relates to divers ecclesiastical persons, and in its enactment, among others, to provosts, chancellors, and any others having dignity or office in any cathedral or collegiate church, and is not limited to corporations sole. In Salkard *v.* Beckwith, 1 Lutw. 116, the cause of action arose upon a vicarage, and the custom is recited as relating to prebendaries, rectors, vicars, masters of free chapels, and chaplains; and, though all may be corporations sole, there is nothing said that so confines it; and sufficient is stated for the plaintiff's case there. Dr. Sand's Case, Skinner 121, appears to be in point for the plaintiff. There, each prebendary of Wells took by appointment from the bishop one of eight houses, with power to move from one to a better; and it was objected that there was no liability, because the house was not part of the corpse of the prebend. But the objection was overruled. The title to the houses and the tenure appear to have been the same as in this case: the only difference is, that there the question was between prebendaries; here it is between vicars choral: but the decision turned on the title to the house, not on the corporate capacity of the occupier. In Radcliffe *v.* D'Oyley, 2 T. R. 635, the
*850] question *arose respecting the houses of the prebendaries of Ely, where by the statutes the chapter was bound to inspect the houses and provide materials for repairs. The argument was that the houses were in the nature of chambers in colleges: but the decision was for the liability, as the reason of the law applied as much to prebendaries as to rectors. In Mason *v.* Lambert, 12 Q. B. 798 (E. C. L. R. vol. 64), the liability of a perpetual curate is affirmed: the objection that seisin of the church endowments in a corporate character was essential, was held

untenable; and the reason of the rule is given so as to extend to such a case as the present.

No direct authority against the plaintiff has been found. In Shaw *v.* Woods, 5 Irish Common Law Rep. 160, the question was whether the vicars choral of Waterford held the vicarage of Lismore so as to be a vicarage with cure of souls to each vicar; and the contrary was decided, on the ground that the vicarage was an appropriation ad mensam in utroque jure to the corporation aggregate of vicars choral, and not a separate interest in any individual member of that body. The decision, upon the facts there in evidence, that the corporation aggregate held the whole, has no relevancy to the present case, resting upon a different state of facts.

Upon this second ground, therefore, in addition to the former, I think the plaintiff can maintain this action. The rule for a nonsuit is discharged. Rule discharged.

*RAMAZOTTI *v.* BOWRING and ARUNDELL. [*851

Nov. 25, 1859.

N., representing himself to be the proprietor of a certain business carried on under the name of The Continental Wine Company, induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was in truth only clerk to R., who was the real proprietor of the establishment. The name of R. appeared over the entrance to the cellar, but it was not visible to persons going to the counting-house. R.'s name also appeared (though in an ambiguous manner) upon a receipt signed by one of the defendants on the delivery of some of the goods.

In an action brought by R. for the price of the goods, it was left to the jury simply to say whether R. or N. was the real proprietor of the business:—Held, a misdirection,—the proper question being whether R. had so conducted himself as to enable N. to hold himself out as the proprietor, and whether the defendants dealt with him upon that footing.

THIS was an action brought by the plaintiff in the Mayor's Court, London, to recover the sum of 6*l.* for wine and spirits alleged to have been sold and delivered to them. Plea, never indebted.

The cause was tried before the Common Serjeant on the 12th of June, 1859. The plaintiff stated that he carried on the business of a wine and spirit merchant in Birchin Lane, under the name of The Continental Wine Company, and that the goods the price of which was sought to be recovered consisted of wine and brandy which had been delivered to the defendants by his agent.

On the part of the defendants, it was proved that the business in Birchin Lane was conducted by one Nixon, the plaintiff's son-in-law; that Nixon was indebted to the defendants to the amount of 18*l.*, and, representing himself to be the proprietor of the Continental Wine Company, induced the defendants to take the goods in question in part satisfaction of his debt to them; that the first parcel was accompanied by a document in the form of a receipt, which was signed by the defendant Arundell, as follows:—

"18th October, 1858.

"Mr. Bowring.

"Please receive twelve bottles Martell's brandy.

"R. A. ARUNDELL.

"From the Continental Wine Company, 23 Birchin Lane.

"J. RAMAZOTTI."

*852] *The rest of the goods (wine) were ordered by the defendant Bowring upon two other occasions, on both of which the plaintiff was present in the counting-house, though the defendants were unaware of his having any interest in the business. The invoices which were sent with the goods did not bear the plaintiff's name, but were headed "The Continental Wine Company;" and at the foot of one of them was written "J. Nixon, Manager."

The plaintiff relied also upon the fact of his name being written over the entrance to the *cellar;* but this, it appeared, would not be seen by persons going to the *counting-house*, and there was no evidence that either of the defendants had ever been in the cellar.

On the part of the defendants, it was submitted that the goods having been sold by Nixon, the agent, without disclosing his principal, the contract could not be enforced by the latter, discharged of the defendants' right of set-off.

The Common Serjeant left it to the jury to say whether the plaintiff or Nixon was the real owner of the business conducted under the name of The Continental Wine Company, telling them, that, if they were of opinion that Nixon was the real owner, they must find their verdict for the defendants, but that, if they thought the plaintiff was the owner, they must find for him.

The jury having returned a verdict for the plaintiff for the sum claimed,

F. Lloyd, in Trinity Term last, obtained a rule nisi for a new trial on the grounds of misdirection and that the verdict was against the evidence.

Laxton showed cause.—The direction of the learned Common Serjeant was perfectly right. The real and only question was, who was the pro-
*853] prietor of the *concern known by the name of The Continental Wine Company. [ERLE, C. J.—Was not the question whether the plaintiff had allowed Nixon to hold himself out as The Continental Wine Company, and so induced the defendants to deal with him?] There was nothing to warrant the defendants in assuming that Nixon was the proprietor of that establishment. Nixon was not the general agent of the plaintiff: and, if he were, his dealing with the defendants was not within the scope of an agent's authority. In Guerriero *v.* Peile, 3 B. & Ald. 616 (E. C. L. R. vol. 5), it was held that a factor has an authority to sell for money, but not to barter: therefore, where a factor bartered the goods of his principal, it was held that no property passed, and that the principal might maintain trover against the party with whom the goods were bartered, although the latter were wholly ignorant that he had been dealing with a factor only. In Cornish *v.* Abington, 4 Hurlst. & N. 549,† it was laid down, that, if any person, by actual expressions or by a course of conduct so deports himself that another may reasonably infer the existence of an agreement or license, and acts upon such inference, whether the former intends that he should do so or not, the party using that language, or who so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct. But here there was no evidence to show that the plaintiff did anything to induce the defendants to suppose that they were dealing with a principal.

F. Lloyd, in support of the rule.—The direction was clearly wrong

An undisclosed principal may, no doubt, sue upon a contract made with his agent; but his right to do so is subject to any equitable right, such as a set-off, of the defendant against the agent. [WILLIAMS, J., referred to Pratt *v.* Willey, 2 C. & P. 350 (E. C. L. R. vol. 12), *where it was held, that, if an agent employed to sell coals make a bargain in his own name with a tradesman to furnish him with coals on credit, for which in return he is to receive goods on credit, and the coals and the goods be both delivered, the real seller of the goods may recover the price from the tradesman, if his name be in the ticket sent with the coals as the seller; because the tradesman after that was bound to inquire into the nature of the agent's situation, and should not continue to treat him as a principal.] [*854 Here, the name of the plaintiff was never mentioned from first to last, but merely that of The Continental Wine Company: and, though the name of Ramazotti was written up over the way down to the cellar, it was shown that that was not visible to those who went to the counting-house, and that neither of the defendants ever visited the cellar. In Sims *v.* Bond, 5 B. & Ad. 389 (E. C. L. R. vol. 27), it was held, that, where a person lends money nominally on his own account, but really on account of another, the real lender cannot recover the money, unless he prove distinctly that the loan was in reality intended to be his, and was received as such. Therefore, where A. as the managing owner of a vessel was permitted by the other owners to have the possession of the warrants or orders of the East India Company, to pay to the said owners or bearer the sum of money therein mentioned for freight; and A. deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account,—it was held, on assumpsit brought after A.'s death by the surviving partners against the bankers, that, on proof of the above facts, they could not recover the money, because it was not shown that the loan was upon their account; for, the fact of the warrants being the property of all the part owners, when placed in the *bankers' hands, was, upon the evidence, consistent with the supposition that the loan of the proceeds to the bankers was A.'s [*855 loan. In delivering the judgment of the court, Lord Denman said: "It is a well-established rule of law, that, where a contract not under seal is made with an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in this latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party. This rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue; but it may be equally applied to other cases: and we do not say, that, where a person lends money nominally on his own account, but really on account of and as the loan of another, the real lender may not sue for the money. But, where money is lent by another in his own name, the plaintiff, who alleges that he was in reality the lender, must prove that fact distinctly and clearly. He must show that the loan, though nominally that of another, was really intended to be his own. It was incumbent, therefore, in this case, upon the plaintiffs to prove, that, when Charles Gribble lent the proceeds of the freight-warrants to the defendants, and had them placed to his credit in an account *kept in his own name*, he was acting in that respect as the agent of the plai-

tiffs, as well as on his own account, and really lending the money to the defendants on the plaintiffs' account as well as his own." Here, the Common Serjeant ought to have left it to the jury to say whether the plaintiff had so conducted himself as to induce the defendants to believe they were dealing with the principal when they dealt with Nixon: *856] whereas, all he left to them was, whether Ramazotti or *Nixon was in truth the Continental Wine Company. That clearly was incorrect. If the plaintiff affirms the contract made by his agent, he must take it with all its incidents.

ERLE, C. J.—I am of opinion that this rule should be made absolute. I think the proper question was not put to the jury. It was left to them by the learned Common Serjeant to say whether Ramazotti or Nixon was the real owner of the business; whereas, the proper question, under the circumstances, would have been whether Ramazotti so conducted himself as to enable Nixon to hold himself out to be the true owner of the goods, whether Nixon did so hold himself out, and whether the defendants in dealing with Nixon believed him to be the owner. Then, if the jury had found those questions in the affirmative and that the contract between Nixon and the defendants was entered into upon that footing, I am of opinion that the undisclosed principal, adopting the contract made by his agent, must adopt in omnibus, and, if it were coupled with an agreement that the defendant should have a right to set off a debt due to him from the agent, the principal must take the contract subject to that agreement of set-off. There is yet a further question. If the jury were of opinion that the act of Nixon was so far to be considered as the act of his principal, and that the delivery of the goods was to be in satisfaction of a debt due from the agent to the defendants, there would be no contract of sale whatever; and that would leave undetermined the question whether or not the unauthorized appropriation by the agent of the property of the principal would not leave the defendants so receiving the goods liable in trover. That, however, is not the form of action here. Upon these grounds, I am of opinion that there ought to be a new trial.

*857] *WILLIAMS, J.—I am of the same opinion, with this difference, that I doubt the principal's being bound to adopt the contract of his agent with all its incidents. I think, however, it would be monstrous to allow the plaintiff, after having waived the tort, and sought to adopt the contract made by Nixon, to resort afterwards to the general contract implied by law from the delivery and acceptance of the goods.

CROWDER, J.—I entirely agree with the view taken by my Lord upon both points. Looking at the manner in which the goods got into the possession of the defendants, I cannot help thinking that there was no contract of sale at all upon which the plaintiff could be entitled to sue. The proper question to leave to the jury was, as suggested by my Lord, whether the plaintiff had allowed Nixon to hold himself out as the proprietor of the business, and whether Nixon had done so, and the defendants had dealt with him upon that footing. There was no contract of sale, but a delivery of the goods by Nixon to the defendants in satisfaction of a debt due to them from him. Whatever, therefore, might have been the result if trover had been brought, it is clear that the plaintiff could not upon these facts maintain an action against the defendants for

goods sold and delivered. In either view, the proper question was not left to the jury, and therefore there must be a new trial.

Rule absolute, without costs.

It is now generally established, that a principal may maintain an action, on a contract whether written or oral, made by his agent in his own name, though the name of the principal and even the fact of agency be unknown to or concealed from the other party: Sanderson *v.* Lamberton, 6 Binn. 129; Parker *v.* Donaldson, 2 Watts & Serg. 9; Beebe *v.* Roberts, 12 Wend. 417; Taintor *v.* Prendergrast, 3 Hill 72; Davies' Executors *v.* Graham's Trustees, 2 Marsh. Ky. 542; Tharp *v.* Farquar, 6 B. Monr. 4; Elkins *v.* Boston & Maine R. R., 19 N. H. 337; N. J. Steam Nav. Co. *v.* The Merchants' Bank, 6 How. U. S. 381; Ford *v.* Williams, 21 How. U. S. 287. The admissibility of parol evidence in such case, the contract being in writing, to establish the existence of an agency, is not open to any technical exception, either on general grounds or under the Statute of Frauds. Such evidence, says Baron Parke, in Higgins *v.* Senior, 8 Mees. & Welsby 843, "in no way contradicts the written agreement. It does not deny that it is binding on those, whom, on the face of it, it purports to bind, but shows that it also binds," or is available to "another, by reason that the act of the agent, in signing the agreement in pursuance of his authority, is in law the act of the principal."

It is equally settled, however, that the principal in an action on such a contract, is subject not only to those defences, which properly grow out of the original transaction, but to any set-off which the defendant had or may have acquired against the agent, in ignorance of the rights of the principal. All that seems to be necessary is that the defendant, in dealing with the agent, shall have acted "in a just belief authorized by the facts of the case," that the agent was the real party in interest. If, indeed, the principal allows the agent to hold himself out to third persons as principal, it becomes, like that in the text, often a case of estoppel by fraud: Gardner *v.* Allen's Executors, 6 Alab. 189; Rathbone *v.* Sanders, 9 Indiana 217; Mitchell *v.* Bristol, 10 Wend. 495; Taintor *v.* Prendergrast, 3 Hill 72; Violett *v.* Powell's Administrators, 10 B. Monr. 349; Parker *v.* Donaldson, 2 Watts & Serg. 9.

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*BAKER *v.* SAUNDERS. *Jan.* 31. [*858

The plaintiff having obtained judgment in ejectment, and executed a writ of possession,—Held, that the defendant was entitled to call upon him to deliver a bill of costs.

THIS was an action of ejectment. The cause was tried at the last Assizes, when a verdict was found for the plaintiff, and a writ of possession was afterwards issued and executed. The defendant, being desirous of taking the benefit of the insolvent debtors act, took out a summons calling upon the plaintiff to show cause why he should not deliver his bill of costs. This was opposed on the part of the plaintiff, on the ground that the delivery of a bill of costs was entirely optional. Byles, J., however, made an order.

Kemplay, on a former day, moved to set aside the order, on the ground that the learned judge had no power to compel the plaintiff to

deliver a bill. [WILLES, J., the only judge in court.—Has the plaintiff signed judgment for costs?] No. [WILLES, J.—Then, what authority have we to compel him to deliver a bill?] The only semblance of an authority for this order is found in a suggestion thrown out by Parke, B., in a case of Doe d. Drax *v.* Filliter, 11 M. & W. 80,† where that learned judge says,—"I think that the defendant should try the experiment of an application for a judge's order upon the lessor of the plaintiff to deliver his bill of costs." A rule nisi having been granted,

Denny now showed cause, submitting that the defendant was entitled to have the costs of the action taxed, in order that he might ascertain the amount to be inserted in his schedule.

Kemplay, in support of his rule.—The court has no authority to com-
*859] pel a plaintiff to deliver his bill of *costs in order that it may be taxed. [WILLES, J.—If the plaintiff does not choose to deliver a bill, I do not see how we can interfere. WILLIAMS, J.—Suppose there are issues found for the defendant, the costs of which will overtop the plaintiff's costs, surely the former ought to have some means of compelling the latter to bring in the record.] The simple question is, whether the defendant has a right to call upon the plaintiff to deliver his bill in order that it may be taxed. [WILLES, J.—I remember a case in the Exchequer, where I moved to compel the plaintiff to sign judgment on demurrer, in order to enable the defendant to go to a court of error. But Mr. Badeley, having no confidence in the decision in his favour, opposed it, and the court refused to compel him to take his judgment.] That is a far stronger case than this: for, here the defendant cannot bring a writ of error.

ERLE, C. J.—Upon the best consideration I am able to bring to this case, I am of opinion that this rule should be discharged. The case seems to me to fall within the rule whereby a defendant, in order that he may not be embarrassed in his proceeding, may call upon the plaintiff to go on. There are many cases where the course pursued by the plaintiff here would be very embarrassing to the defendant, by preventing him from effecting an arrangement with his creditors. Dealing with the case upon general principles, and adopting the suggestion thrown out by Parke, B., in the case referred to, I see no sound reason for holding that the view taken by my Brother Byles was wrong. I therefore think the rule should be discharged, but without costs.

WILLIAMS, J.—I am of the same opinion. I think this is a step in the right direction.

*WILLES, J.—I must confess I have entertained some doubt:
*860] but, upon the whole, I think the view taken by the Lord Chief Justice is the correct one. It is certainly a novelty, and therefore there should be no costs. Rule discharged, without costs.

END OF HILARY TERM.

*IN THE EXCHEQUER CHAMBER. [*861

TRINITY VACATION, 23 VICTORIA.

BECKH *v.* PAGE and Another.

The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per Ontario, Calcutta to Hamburgh, and to be delivered in London, at 11½*d.* per lb. round, but the wrappers to be charged at 8*d.* per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, on appeal,—affirming the judgment of the court below,—that the words "or any less number that may arrive," applied to the number of *bales*, and not merely to the number of *hides*, and consequently that the defendants were liable for not accepting the 97 bales.

THIS was an action upon a contract entered into by the defendants with the plaintiffs for the purchase of certain East India hides. The contract was as follows:—

"London, 21st February, 1857.

"Messrs. Page & Welch.

"Gentlemen,—We have this day bought, by your orders and for your account, of Messrs. E. Beckh & Co.,

"P. B. 326/425, 100 bales, containing 15,600,

"H. B. 1/15, 15 bales, containing 2,340,

(or any less number that may arrive) East India hides, said to be very good Patna, shipped per Ontario, Calcutta to Hamburgh, and to be delivered in London, at 11½*d.* per lb. round; but the wrappers to be charged at 8*d.* per lb. The hides to be taken with all faults and defects, but the buyers to have the benefit of any claim that may be recovered on the original policy of insurance between Calcutta and Hamburgh, or on the policy to be effected between Hamburgh and London; to be invoiced at the landing weights from the Queen's beam, and to be at the buyers' risk and expense from the time of being weighed: the weight of wrappers to be averaged by weighing those from a few bales. Tare for ropes to be estimated by stripping a few bales. Usual draft to be allowed.

*"Should the above-mentioned vessel be lost, or should the ship bringing the hides from Hamburgh be lost, this contract to be null and void. [*862

"Any question or dispute that may arise upon this contract, to be settled and decided by the selling brokers."

The pleadings and facts are set out in the report of the case in the court below,—5 C. B. N. S. 708 (E. C. L. R. vol. 94),—where it was held that the words "or any less number that may arrive" applied to the number of *bales*, and not merely to the number of *hides*, and consequently that the defendants were liable for not accepting a smaller number of bales (viz. 97) than the number mentioned in the contract.

The defendants appealed against this decision, and the appeal came on for argument before Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., Channell, B., and Watson, B.

J. Wilde, Q. C. (with whom was *Honyman*), for the appellants, the defendants below, submitted, that, upon the true construction of the contract set out in the case, the defendants were not bound to accept less than 115 bales, and consequently were not bound to take the 97 bales; and that the words "or any less number that may arrive" applied to the number of hides, and not to the number of bales,—the purchasers being obliged to take the 115 bales, though some or all of them should contain less than the proper number of hides, but not to take the hides if the number of bales should be short of the stipulated number.

Montague Smith, Q. C. (with whom was *Blackburn*), was not called upon.(*a*)

*863] *WIGHTMAN, J.—We are all of opinion that the judgment of the Court of Common Pleas is right. The question is, whether the words in the contract "or any less number that may arrive" are applicable only to the hides, or to the bales, or to both hides and bales. I think the meaning and intention of the parties was that these words should apply to the bales as well as to the hides. It is difficult to see what difference it could make to the purchasers whether the number of bales should be short or the number of bales right and the number of hides therein short of that specified in the contract. None has been suggested: and, upon the best consideration I can give to the matter, I think the language of the contract is equally applicable to both.

BRAMWELL, B.—I am entirely of the same opinion. If the purchasers had intended to insist upon having the full number of 115 bales, I think they would have used language very different from that which we find in this contract.

The rest of the court concurring, Judgment affirmed.

(*a*) The point intended to be argued on the part of the respondent, was,—"That, upon the true construction of the contract, the purchasers were bound to accept any number of the bales specified in the contract that might arrive, though less than the whole number."

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*864] *THE HON. GEORGE CHARLES MARQUIS CAMDEN *v.* BATTERBURY.

By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereinafter agreed and covenanted to be built by him upon the land thereinafter described and agreed to be demised, &c., by indenture, demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September, then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one-sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c.; to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several *yearly rents* or sums thereinbefore stipulated or agreed to be reserved in the leases to

be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the said *yearly rent or rents* thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days.

In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—

Held.—affirming the judgment of the Court of Common Pleas,—that neither E. nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums.

THIS was an action for money payable by the defendant to the plaintiff for the defendant's use by the plaintiff's permission of certain lands, messuages, tenements, and premises of the plaintiff, and for money due from the defendant to the plaintiff on accounts stated between them. Plea, never indebted.

The cause was tried before Willes, J., at the Summer Assizes for Surrey in 1853, when the following facts and documents were given in evidence:—

On the 4th of February, 1853, an indenture of agreement was entered into by and between the plaintiff of the first part, The Rev. Thomas Randolph of the second part, and John Watts Elliott of the third part, in the words and figures following, that is to say,—

*"This indenture of agreement, made, &c., between, &c., witnesseth, that, in pursuance of an act of parliament passed in [*865 the 53d year of the reign of King George the Third, intituled 'An act for enabling the prebendary of Cantlowes, in the cathedral church of St. Paul, in London, to grant a lease, with powers of renewal, of the prebendal lands of Kentish Town, in the county of Middlesex,' and in consideration of the expense which the said J. W. Elliott, his executors, administrators, or assigns, will be at in erecting the messuages or tenements and buildings hereinafter covenanted to be erected and built upon the ground hereinafter described and agreed to be demised, and also in consideration of the yearly rents, covenants, and agreements hereinafter reserved and contained on the part of the said J. W. Elliott, his executors, administrators, and assigns, he the said Charles Marquis Camden, with the privity, consent, and approbation of the said Thomas Randolph (testified by his being a party to and signing, sealing, and delivering these presents), doth hereby, for himself, his heirs, executors, and administrators, covenant and agree with the said J. W. Elliott, his executors, administrators, and assigns, that he the said Marquis, his executors, administrators, and assigns, shall and will, at the costs and charges of the said J. W. Elliott, his executors, administrators, or assigns, from time to time, when and so soon as he the said J. W. Elliott, his executors, &c., shall have erected and covered in one or more of the messuages or tenements hereinafter agreed and covenanted to be built by him upon the piece or parcel of ground hereinafter described and agreed to be demised, and laid the gutters with lead or iron, and fixed up iron pipes to carry off the water, and made the areas and the fence and garden walls nine inches in thickness at the least to divide and separate each house and the ground *to be thereto [*866 allotted for yards or gardens from the yards or gardens of the premises adjoining on each side, by indenture or indentures of lease

demise and lease unto the said J. W. Elliott, his executors, administrators, nominees, or assigns, the whole or such part or parts whereon one or more of the said messuages or tenements shall be built and covered in and such other things thereon done as aforesaid, of All that piece or parcel of ground situate, lying, and being at Camden Town, in the county of Middlesex aforesaid, fronting, &c., &c., Together with the several brick messuages or tenements and buildings which shall be erected and built on the pieces or parcels of ground hereinbefore described and hereby agreed to be demised pursuant to the covenants for that purpose hereinafter contained (except and always reserved unto the said Marquis Camden, his executors, &c., and his and their tenants of the adjoining property, the free passage and running for water and soil through the sewers and drains made or to be made upon, through, or under the said several pieces or parcels of ground and other the premises hereby agreed to be demised: to hold the said piece or parcel of ground and other the premises hereby agreed to be demised, with their appurtenances (except as aforesaid), unto the said J. W. Elliott, his executors, &c., from the 29th day of September now last past (1852), for and during and unto the full end and term of ninety-eight years thence next ensuing and fully to be complete and ended: Yielding and paying therefor, for and during the first year of the said term *the rent or sum* of 30*l.*, and for and during the second year of the said term the *rent or sum* of 60*l.*, and for and during the third year of the said term the *rent or sum* of 120*l.*, and for and during the fourth year of the said term the *rent or sum* of 200*l.*, and for and during the fifth year
*867] and the remainder of the said term the *yearly* *rent or sum of 285*l.*, and that in the several proportions and manner following, that is to say, one equal third part of the said several rents unto the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, and the remaining two equal third parts thereof respectively unto the said George Charles Marquis Camden, his executors, &c.,—the said several *yearly rents* to be paid and payable in lawful money of Great Britain, and that by equal quarterly payments on the 25th of March, &c., in every year, free and clear of and from all present and future rates, taxes, assessments, impositions, and other deductions and abatements whatsoever, whether parliamentary, parochial, or otherwise, the first quarterly payment of which rent became due on the 25th day of December now last past; and the said *rents* to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid shall not exceed one-sixteenth part of the clear yearly rack-rent or annual value of the land and buildings to be thereby demised, reckoning such rack-rent or annual value upon the said land and buildings when the same shall be completely finished and fit for habitation, and be not less than 40*s.*: Provided, nevertheless, that, if the yearly rent or rents to be reserved upon or by the lease or leases to be granted of any part or parts only of the piece or parcel of ground hereinbefore described and agreed to be demised shall amount to or make up the full yearly rent or rents hereby agreed to be reserved and made payable, then and in such case the remainder of the said piece or parcel of ground, or any part or parts thereof, shall, from time to time when and as the same shall be built upon in the manner aforesaid, be demised and leased, together with the said houses and buildings there-

upon erected, at the yearly rent of a peppercorn only: And it is agreed, *that, in every such lease to be granted as aforesaid, [*868 shall be contained on the part of the said J. W. Elliott, his executors, administrators, nominees, or assigns, such covenants and agreements as are usually inserted in leases granted on the same estate, and also in particular that no art, trade, or business whatsoever shall be carried on in or upon the said pieces or parcels of ground hereinbefore described or in or upon any of the messuages or tenements or buildings to be erected as hereinafter agreed, except on the messuages or tenements to be built on the north-east frontage of the said pieces or parcels of ground next to the York Road, and which may be converted into shops, so that there be not among the said shops more than two bakers' shops, two butchers' shops, and two chemists' shops: Provided always, that there shall not be carried on upon any of the houses or premises thereto belonging so allowed to be converted into shops as aforesaid any of the trades aforesaid, that is to say, a slaughterman, tallow-chandler, &c., &c., or any noisome or offensive art, trade, or business whatsoever: and all the rest of the said messuages or tenements to be built upon the said pieces or parcels of ground are to be private residences, except the messuage or tenement being the corner house to be built upon the said second-mentioned piece or parcel of ground facing the said York Road and Camden Park Road, which may be converted into a public house, not being a beer-shop, unless with the consent in writing of the said Marquis, his executors, &c., first had and obtained; and that the insurance against fire shall be effected and kept up in the joint names of the said George Charles Marquis Camden, his executors, &c., and the said J. W. Elliott, his executors, administrators, nominees, or assigns, and shall be effected and kept on foot by and at the expense of the said J. W. Elliott, his *executors, administrators, nomi- [*869 nees, or assigns, in an office in London or Westminster to be approved by the said George Charles Marquis Camden, his executors, &c., and shall and will from time to time, upon the requisition of the said Marquis, his executors, &c., or his or their surveyor or agent of the said Camden Town estate, produce and show the policy or policies of every such insurance, and the receipt or receipts for the premium or premiums paid thereon: and it is agreed, that, in every such lease, there shall be contained on the part of the said Marquis the usual covenant entered into by him for quiet enjoyment by the lessee or lessees therein, on payment of the rent and observance and performance of the covenants and agreements therein to be reserved and contained: And the said J. W. Elliott doth hereby, for himself, his heirs, &c., covenant and agree with the said George Charles Marquis Camden, his executors, &c., in manner following, that is to say,—to pay the several yearly rents,—to pay all rates and taxes: And further, that he the said J. W. Elliott, his executors, &c., shall and will, at his and their own costs and charges, with such materials, and of such quality or description as hereinafter specified, in a good and workmanlike manner, and within the period or periods hereinafter mentioned, erect and completely finish fit for habitation, according to the plan drawn in the margin of the first skin of these presents, the following brick messuages or dwelling-houses of not less than the full sized third rate or class of buildings, so that each house or residence shall be of the full net annu

value of 50*l.*, that is to say, &c., &c.: And it is hereby expressly stipulated and agreed between and by the said several parties hereto, and particularly by or on the part of the said J. W. Elliott, his executors, &c., that the brickwork to be used in the said buildings shall be of good sound stock bricks; *that the fronts of the said messuages or dwelling-houses shall be faced with seconds, &c., &c.; that plans and elevations showing thereon the height of the stories, the scantlings of the timbers, the thickness of the floors and doors, and generally the intended disposition of all the said messuages or dwelling-houses and buildings hereby agreed to be demised shall be previously to the commencement thereof submitted by the said J. W. Elliott, his executors, &c., to the said Marquis, his executors, &c., or to his or their surveyor for the time being, and be approved of by him or them; and that the whole of the same buildings shall afterwards be erected and finished according to such approved plans and elevations, and in a substantial and workmanlike manner, to the entire satisfaction of the said Marquis, his executors, &c., or his or their surveyor for the time being: And it is hereby expressly provided and agreed that no art, trade, or business whatsoever shall be carried on in or upon the messuages or tenements and premises aforesaid, or any of them, or any part thereof, except as hereinbefore stated, nor any other buildings be erected upon the said piece or parcel of ground hereby agreed to be demised, or any part or parts thereof, other than such as are hereinbefore expressly covenanted or agreed to be erected thereon (except stables for private occupation when and where approved by the said Marquis, his executors, &c., or his or their surveyor), unless with the license or consent in writing of the said Marquis Camden, his executors, &c., for any such purpose as aforesaid first had and obtained under his or their hand or hands: And it is hereby further stipulated and agreed by and between the said parties hereto, and the said J. W. Elliott doth, for himself, his heirs, &c., covenant, promise, and agree with and to the said George Charles Marquis Camden, his executors, &c., that he the said J. W. Elliott, his executors, &c., shall and will erect and build and completely finish fit for habitation, in manner and according to the stipulations or agreements aforesaid, upon the said two several pieces or parcels of ground *hereby agreed to be demised*, twenty-four single or twelve semi-detached at least of the said messuages or dwelling-houses so agreed to be erected as aforesaid, within the first two years of the term *hereby agreed to be granted*, and the whole remainder of the said messuages or dwelling-houses within the three following years of the said term: [Then followed a covenant by Elliott, his executors, &c., to make foot and carriage ways and sewers: and a covenant not to dig the said piece or parcel of ground thereby agreed to be demised, or any part thereof, further or otherwise than should be necessary for the foundation of the houses and making the areas, vaults, privies, and drains, or otherwise laying out the same, nor make or burn any bricks, tiles, or lime thereon:] And further, that he the said J. W. Elliott, his executors, &c., shall and will always accept and take such lease or leases as is or are hereinbefore agreed to be granted, at the rents and under the terms and conditions aforesaid, and execute and deliver two counterparts thereof respectively, the expense of each lease and of one of the counterparts thereof and the registration thereof, as well as the expense of and relating to these presents and

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the counterpart and registration thereof, to be paid by the said J. W. Elliott, his executors, &c., and the expense of the other counterpart to be paid by the said George Charles Marquis Camden, his executors, &c., by whose solicitors all such leases and the counterparts and registration thereof, as also the duplicate and registration of these presents, shall be prepared and effected: Provided, nevertheless, and it is hereby declared and agreed by and between *the parties hereto, that in each and every lease to be granted by virtue and in pursuance of these [*872 presents, there shall be comprised two messuages or tenements at least, with the ground, out-offices, and appurtenances thereto belonging, unless the said J. W. Elliott, his executors, administrators, nominees, or assigns, shall be desirous of having only one messuage or tenement, with the ground, out-offices, and appurtenances belonging thereto, comprised in any such lease,—in which case the said J. W. Elliott, his executors, administrators, nominees, or assigns, shall also pay the expense of the second counterpart of every additional lease which shall be granted by the said Marquis Camden, his executors, &c., in consequence of and in compliance with such desire; anything herein contained to the contrary thereof in anywise notwithstanding: And the said J. W. Elliott doth hereby, for himself, his heirs, executors, and administrators, further covenant and agree with the said Marquis Camden, his executors, &c., and also (as a separate covenant) with the said Thomas Randolph and his successors, prebendaries of the prebend aforesaid, that henceforth until the said piece or parcel of ground and the buildings to be erected as aforesaid, shall be leased in execution of the covenant or agreement in that behalf hereinbefore contained, he the said J. W. Elliott, his executors, &c., shall and will pay for the same the several yearly rents or sums hereinbefore stipulated or agreed to be reserved and made payable in the leases to be granted as aforesaid, to such persons and in such manner and proportions, and at such times as the same would be payable in case such lease or leases reserving such rents were actually granted pursuant to the agreement hereinbefore in that behalf contained; and also that he the said J. W. Elliott, his executors, &c., shall and will in the meantime until the granting of such lease or leases well *and truly perform, fulfil, and keep all and every the covenants and [*873 agreements hereinbefore stipulated and agreed to be inserted and contained in such lease or leases on his and their part, in like manner as he or they would be bound to do if such lease or leases had been actually granted to him or them, so far as the nature of the case will admit: Provided always, and it is hereby declared and agreed, that, if the whole or any part of the said yearly rent or rents hereby or by the said leases so to be granted as aforesaid to be reserved, shall be behind or unpaid for the space of twenty-one days next over or after any or either of the days or times whereon the same ought to be paid as aforesaid, or if the said J. W. Elliott, his executors, &c., shall make default in erecting, building, and finishing the several messuages or tenements, erections, and buildings aforesaid, within the times or in the manner hereinbefore stipulated for those purposes, or if, when the said messuages or tenements and buildings shall be so far finished as according to the stipulations aforesaid would entitle the said J. W. Elliott, his executors, &c., to have a lease or leases thereof, he or they shall refuse to accept such lease or leases and duly execute and deliver counterparts thereof, or on breach

or non-performance of all or any of the covenants, clauses, conditions, and agreements herein contained or referred unto, and which by or on the part of the said J. W. Elliott, his executors, &c., are or ought to be observed, performed, and kept according to the true intent and meaning of these presents, then and from thenceforth, and in any of the said cases, and at any time then afterwards, it shall and may be lawful for the said George Charles Marquis Camden, his executors, &c., into and upon the same premises, or any part thereof in the name of the whole, wholly to re-enter, and the said J. W. Elliott, his executors, &c., and all
*874] other *tenants and occupiers of the same premises, thereout and from thence utterly to expel and remove, and all and singular the same premises, or so much thereof as shall not then have been actually leased, to have again, retain, repossess, and enjoy as in his and their first and former estate, anything hereinbefore contained to the contrary thereof in any wise notwithstanding: Provided also, and it is hereby further declared and agreed that the said George Charles Marquis Camden, his executors, &c., shall not be bound to grant any lease or leases as aforesaid until all arrears of the said *yearly rents* hereinbefore covenanted and agreed to be paid in the meantime shall have been fully paid and satisfied up to the quarter-day immediately preceding the granting thereof respectively, if the same shall be executed before the last day of the then current quarter: Provided also, that the reservation of rent in any lease or leases so to be granted as aforesaid shall not comprehend any rent which shall have been paid in the meantime, according to the covenant in that behalf hereinbefore contained, which payment or payments shall be accepted in satisfaction pro tanto of the rent or rents hereinbefore stipulated or agreed to be reserved in any such lease or leases respectively. In witness," &c.

Until the 31st of January, 1834, Elliott paid the several sums of money covenanted in the articles to be paid by him; and also between the 4th of February, 1853, and the 31st of December, 1853, erected and built in pursuance of and according to the covenant therein, and upon the ground mentioned therein, a tavern and premises and also four other houses, being five of the messuages covenanted to be built; and the several messuages so built by Elliott were duly demised to him by the plaintiff by him by six several indentures of lease, at several rents, amounting to the yearly rent of 35*l.*

*875] *The case then set forth the evidence of one Booth, an auctioneer and estate-agent, to the effect that he had been employed from about the end of the year 1853 to let the houses upon the land in question for the defendant.

On the 31st of January, 1854, Elliott, by an indenture reciting the agreement of the 4th of February, 1853, that Elliott had erected certain houses upon the land therein agreed to be demised, and that leases thereof had been granted to him, Elliott, in consideration of a certain debt of 250*l.* due from him to the defendant, and of 1250*l.* paid to him by the defendant, assigned to the defendant, his executors, &c., the said articles of agreement, and all the right, title, &c., which he had in the premises,—"subject to the observance and performance by and on the part of the defendant, his executors, &c., to be performed, of all such of the covenants, agreements, and stipulations as were then unperformed or capable of taking effect;" with a covenant by Elliott, his executors,

&c., to use his and their best endeavours to induce and procure the marquis to grant to the defendant, his executors, &c., a lease or leases of so much of the said land of which no lease or leases had yet been granted; and a covenant by the defendant to perform and fulfil all the covenants and stipulations which remained subsisting and unperformed or capable of taking effect, and to indemnify Elliott, his executors, &c., from and against the same covenants, &c.

From the said 4th of February, 1854, up to the 25th of March, 1857, the defendant paid Mr. Shaw, the plaintiff's agent, the several yearly sums covenanted to be paid by the articles of agreement: and Mr. Shaw on those occasions gave him receipts for the same, describing the sums received as having been received for "so many quarters' rent due to the Marquis Camden *and the Prebendary of Cantlowes. [*876 On three occasions the receipt was given by the plaintiff's attorneys, and the money was therein expressed to be received as "a further instalment on account of arrears of rent under his building agreement due to the Marquis of Camden," "a further instalment of the amount due under the building agreement to the Marquis of Camden," and "the balance due Lady Day last under your building agreement to the Marquis Camden."

In the years 1854 and 1856, the defendant erected and built certain stables and a dwelling-house and shop on a part of the land, and obtained from the plaintiff, who then granted to him, two leases of the same according to the provisions of the articles of agreement, reserving to the plaintiff for the stables a rent of 5*l.* per annum, and for the house and shop 4*l.* per annum.

The two last-mentioned rents, added to the rents reserved on the leases to Elliott as before mentioned, amounted to 44*l.*, which sum, deducted from the sum of 285*l.*, the yearly sum payable according to the articles of agreement for the year ending at Lady-day, 1858, left the sum of 241*l.*, the sum endorsed upon the writ of summons.

No payments were made by the defendant or by Elliott to the plaintiff subsequently to the 25th of March, 1857, except the rents reserved by the several indentures of lease, amounting to 44*l.* as aforesaid.

On the 23d of May, 1857, the defendant, by indenture, assigned all his interest in the premises to one George White.

At the trial it was arranged that a verdict should be found for the plaintiff for 241*l.*, with leave for the defendant to move to enter a nonsuit, or a verdict for the defendant,—the court to be in place of a jury, and all amendments which a judge could have made to be *made [*877 by the court. Accordingly, in Michaelmas Term, 1858, a rule nisi was obtained to enter a verdict for the defendant, pursuant to the leave reserved, on the grounds,—first, that the building articles amounted to an actual demise,—secondly, that the defendant never took any interest except under the building agreement, and was not tenant from year to year,—thirdly, that, if there was any tenancy from year to year, Elliott became such tenant, and that tenancy was assigned to the defendant, and by him assigned over,—fourthly, that, if any rent was recoverable, it would be due to the plaintiff and Randolph or the prebendary of St. Paul's.

The rule was made absolute for a nonsuit in Hilary Term following,—see 5 C. B. N. S. 808.

The plaintiff appealed, and the case was argued in the Exchequer Chamber in Trinity Vacation, 1859, before Wightman, J., Erle, J., Crompton, J., Martin, B., Bramwell, B., Channell, B., and Watson, B.

Lush, Q. C. (with whom was *Malcolm*), for the plaintiff, submitted,—as was urged in the court below,—that the building agreement was a agreement for future leases, wiith a stipulation for payment of rent in the meantime till the leases were granted; that, by the occupation of the land and payment of rent under that agreement, Elliott, and subsequently the defendant, became tenants from year to year; and that that relation could only be determined by a notice to quit. He cited Buckworth *v.* Simpson, 1 C. M. & R. 834.†

Bovill, Q. C. (with whom was *Honyman*), contrà, was not called upon.

WIGHTMAN, J.—I am of opinion that the judgment of the Court of *878] Common Pleas is correct, and there is no *ground whatever for implying a tenancy from year to year in the defendant. The payments which have been made by him appear to have been made under a collateral liability, viz., payments of moneys under the building contract, under which it was stipulated that Elliott should have the possession of the land for the purpose of building certain houses thereon. No contract of tenancy, in my judgment, was created by that agreement. The receipts given from time to time very clearly show what was the nature of the dealing between the parties. They are called, not simply "arrears of rent," but "arrears of rent under your building agreement." The defendant stood in the place of Elliott as his assignee under that building agreement. There is nothing to show that Elliott is not still liable under his covenant in that agreement to pay the very sum which it is now sought to enforce against the defendant.

ERLE, J.—I also am of opinion, that, looking at the facts of this case, they do not entitle the plaintiff to maintain that there was a determination of Elliott's liability, or that the defendant became the plaintiff's tenant.

MARTIN, B.—I am entirely of the same opinion. By the agreement, Elliott was to have leases of the land as the houses were built. It is insisted, on the part of the plaintiff, that by paying *rent* Elliott became tenant from year to year. Assuming for a moment that that was so,—there is a contract in writing between Elliott and the defendant, whereby all Elliott's interest in the building agreement is assigned to the defendant. It is urged that that was not an assignment of the lease from year to year between the plaintiff and Elliott; but that a new tenancy *879] was created as between the *plaintiff and the defendant by the subsequent payment of rent. But there is no evidence whatever that the plaintiff was ever party to any agreement for a tenancy as between himself and the defendant. The moneys the plaintiff received were received as moneys due under the building agreement. If there ever was any tenancy from year to year, it was an original tenancy by Elliott, which was assigned by him to the defendant, and by the defendant to White before the alleged claim of the plaintiff accrued. Buckworth *v.* Simpson, 1 C. M. & R. 834,† which was relied on for the plaintiff, was no doubt correctly decided, but it has no bearing upon this case.

CROMPTON, J.—I also am of opinion that this action will not lie. The

plaintiff is in this dilemma: either the payments made under the building agreement are payments of *rent*, or they are not. If they are collateral sums, and not rent, the now defendant could not be liable as a tenant from year to year, for then there would be no payment of rent by him; and there is nothing else from which it has been suggested that a tenancy can be implied. But, supposing that they were payments of rent under a tenancy from year to year,—or upon an original demise, if the agreement with Elliott amounts to a demise,—still the defendant is not liable. The case is distinguishable from that suggested, of the landlord and the original tenant and the assignee meeting, and mutually agreeing that there shall be a surrender of the old lease and a fresh demise made to the assignee. The question then would be, whether the original tenancy was determined. In the present case, I do not perceive that the liability of Elliott has been in any way put an end to. I cannot agree with Mr. *Lush* that we can sever the liability of Elliott as tenant from his liability to pay money under the *stipulations contained in the building agreement. That agreement must be looked at to see, as a matter of fact, whether or [*880 not it was intended to create a tenancy. I think it is impossible to suppose that the plaintiff could have intended to release Elliott and to create a new tenancy as between himself and the defendant. There was nothing from which, in point of law,—or looking at it as a matter of fact, as I think, we must do,—from which we can imply the creation of a new tenancy in the defendant. All the payments made by him were payments in discharge of the liability of Elliott under the building agreement. I think we cannot imply a new tenancy, whilst the old liability is still subsisting.

BRAMWELL, B.—I am of the same opinion. The plaintiff does not show any agreement under which the defendant was to pay rent for the occupation of this land. Had nothing appeared in the case but the annual payments, perhaps a tenancy from year to year might have been inferred. But it turns out that the defendant occupied under the permission originally given to Elliott,—whether that created a tenancy in him or not. To my mind, it is clear that Elliott still remains liable for the very sums in respect of which this action is brought. There is no evidence whatever of any contract or promise by the defendant to pay rent to the plaintiff. Judgment affirmed.

AN

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TO

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It being in contemplation to construct a railway from Verrieres to Thielle, in the canton of Neuchâtel, in Switzerland, and the plaintiff being a person of influence there, and desirous that the construction of such railway should be carried into effect, and having prepared certain plans and drawings for that purpose, and incurred expenses in relation to the proposed undertaking,—it was agreed between the plaintiff and the defendant and one Merrett, amongst other things, that the plaintiff would give his support and aid to the defendant and Merrett for obtaining the concession or grant of the right of constructing such railway; that the defendant and Merrett would construct the railway; that they should be paid for their works in advance by means of the issue of shares in a company to be formed; that, with two-thirds of the capital, the defendant and Merrett should construct the railway, and that the remaining one-third should be remitted in free shares to the plaintiff; and that the shares so to be placed at the disposal of the plaintiff should cover all that might be due to the plaintiff as well for his trouble as for certain other expenses to be incurred by him.

Application was accordingly made for the concession; but, as two other persons, named Besnard and Beslay, were also endeavouring to procure the concession for themselves, it was ultimately arranged that all the parties should join in one application, which resulted in the grant of a concession to the defendant in conjunction with Messrs. Besnard and Beslay, Merrett, and one Lelievre; and a second agreement was entered into, to which Besnard and Beslay became parties, whereby it was, amongst other things, agreed that 35,600*l.* in free shares was to be allotted to the plaintiff for the care and trouble he had had up to that time, and which he might yet have to take up to the complete organization of the company. The defendant afterwards assigned his interest in the concession to a third person.

In an action against the defendant upon the above agreements, alleging for breach, that, by default of the defendant, the company had never been formed, and no free shares had been appropriated to the plaintiff:—Held, that there was no consideration for a binding promise on the part of the promoters of the undertaking to give the plaintiff the shares,—the mere expectation of future services of the plaintiff not being a valid consideration; and his past services not having been rendered for any payment or allotment of shares stipulated to be made in the event which had happened, of a joint concession to the defendant and his rivals. *Pourtales Gorgier v. Morris*, 588

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1. *Description of instrument.*]—In the memorial of an annuity under the 53 G. 3, c. 141, it is not necessary particularly to describe the instrument of grant: it is enough to state it to be a "grant of annuity." The consideration for an annuity was stated in the memorial to be 4000*l.* Of this sum 400*l.* was (pursuant to a previous understanding) immediately handed by one of the grantors to the solicitor for the grantee for procuration-money and expenses:—Held, that this, though it might have been ground for a motion to set aside the securities under the 6th section of the 53 G. 3, c. 141, afforded no defence by way of plea to an action upon the covenant. *Howkins v. Bennet,* 507

2. *Witnesses.*]—There were *two* attesting witnesses to the deed; but, in the memorial, the names of *four* persons appeared as witnesses,—the clerk in copying the attestation having by mistake inserted the names of *two of the grantors*:—Held, that this was so evidently a blunder that no one could be misled by it, and that therefore it did not affect the validity of the memorial. *Id.*

Usury.

3. The annual payments (exceeding 5 per cent. on the sum advanced) were secured upon land, and the principal sum by a policy on the life of one of the grantors, with a covenant for payment of the annual premium:—Held, that the transaction was not usurious,—the principal being still placed in some degree of jeopardy. *Howkins v. Bennet,* 507

ARBITRAMENT.

Costs.

A cause was referred by judge's order before verdict,—*the costs of the cause and of the reference and awarded to abide the event:* the arbitrator found for the plaintiff upon certain issues, damages 12*l.* 12*s.*, and that there was due to the defendant on a plea of set-off 9*l.* 7*s.* 6*d.*, and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3*l.* 4*s.* 3*d.*:—Held, that the event of the cause being in favour of the plaintiff, he was entitled to the costs. *Jones v. Jones,* 832

ASSAULT.

See LANDLORD AND TENANT.

ASSIGNEES.

Rights of,—See FIXTURES.

ASSIGNMENT.

Of freight and passage-money, see SHIPPING, 2.

ATTORNEY.

Authority of,—See SHERIFF, 1.

Delivery of Bill.

The plaintiff having obtained judgment in ejectment, and executed a writ of possession,—Held, that the defendant was entitled to call upon him to deliver a bill of costs. *Baker v. Saunders,* 858

AUCTION.

See PUBLIC RESORT.

BANKRUPT.

Debts provable.

1. *Contingent liability.*]—Bankruptcy during the currency of a quarter (and subsequent certificate) is no bar to an action by a schoolmaster for board and tuition of the bankrupt's son under a quarterly contract,—the demand not being a *debt* "not payable at the time of the bankruptcy," within s. 172 of the 12 & 13 Vict. c. 106, or "a liability to pay money upon a contingency," within s. 178. *Hopkins v. Thomas,* 711

Messenger's Fees.

2. The trade-assignee under a fiat in bankruptcy is not personally liable to the messenger for work done in his time, unless there is either an express contract or an express employment of the messenger by the trade-assignee. *Stubbs v. Twynam,* 719

BARON AND FEME.

See HUSBAND AND WIFE.

BILL OF EXCHANGE.

Endorsed in blank.

1. Where a bill is endorsed in blank, it is competent to the holder to hand it over to a third person to sue upon it on his behalf. *Law v. Parnell,* 282

2. The manager of an association established under the 7 & 8 Vict., c. 110, and also carrying on the business of a deposit and discount bank, bonâ fide received from a customer a bill of exchange endorsed in blank:—Held, that it was competent to him to sue upon it in his own name only, without the endorsement of the bank, although he was a partner and shareholder in the concern,—it appearing that it was a part of his duty as manager to keep possession of and to realise the securities which came to his hands in that character. *Id.*

Destruction or Cancellation of.

3. A. accepted a bill and gave it to B. (who put his name thereto as drawer) for the purpose of his procuring it to be discounted and handing over the proceeds to him. B.

having failed to discount it, returned the bill to A., who tore the bill in half (intending, as the jury found, to cancel it), and threw the two pieces into the street. B. picked them up in A.'s presence, and afterwards pasted the two pieces together, and put the bill in circulation.

The tearing of the bill was done in such a way that the appearance of the bill was as consistent with its having been divided for the purpose of safe transmission by the post as with its having been torn for the purpose of destroying it:—

Held,—it being reserved for the court to draw inferences of fact,—that A. was liable upon the bill at the suit of a bonâ fide holder without notice. *Iingham v. Primrose*, 82

4. Whether the act of so reconstructing the bill amounted to forgery,—*quære?* *Id.*

BOILER.

See FIXTURES.

BROKER.

Authority of,—See INSURANCE. JOINT STOCK COMPANY, 3.

BUILDING ACT.

See METROPOLITAN BUILDING ACT.

BUILDING AGREEMENT.

Construction of.

By articles of agreement under seal, the plaintiff covenanted with one E. that he would, from time to time, when and so soon as he should have erected and covered in one or more of the messuages thereinafter agreed and covenanted to be built by him upon the land thereinafter described and agreed to be demised, &c., by indenture, demise and lease unto E., his executors, &c., the whole or such part or parts whereon one or more of the said messuages or tenements should have been built, &c., for ninety-eight years from the 29th of September, then last (1852), at a certain yearly rent, payable quarterly,—the rents to be so apportioned that the yearly rent to be reserved on any such lease to be granted as aforesaid should not exceed one sixth of the yearly value of the land and buildings to be thereby demised; with a proviso, that, if the yearly rent or rents to be reserved upon the lease or leases to be granted of any part or parts only of the land thereby agreed to be demised should amount to or make up the full yearly rent thereby agreed to be reserved, the remainder of the land, when built upon, should be demised and leased at the yearly rent of a peppercorn only. The articles then contained a covenant by E. with the plaintiff to pay the rent thereinbefore agreed to be reserved, and to pay rates, &c.; to erect the messuages; and also a covenant, that, until the land, and the buildings erected as aforesaid, should be leased in execution of the covenant in that behalf, the said E., his executors, &c., would pay for the same the several yearly rents or sums thereinbefore stipulated or agreed to be reserved in the leases to be granted, to such persons, and in such manner and proportions, and at such times as the same would be payable in case such leases were actually granted. There was also a proviso for re-entry by the plaintiff, in case the whole or any part of the said yearly rent or rents thereby or by the said leases so to be granted as aforesaid to be reserved, should be behind or unpaid for twenty-one days.

In January, 1854, E. assigned all his interest in the agreement to the defendant, who thereupon entered and occupied the land, erected certain buildings thereon, and paid the stipulated yearly sums, and then assigned to one W.:—

Held,—affirming the judgment of the Court of Common Pleas,—that neither E. nor the defendant acquired any estate in the premises under the building agreement, nor was any tenancy from year to year created thereby, or by the occupation of the land and payment of the stipulated sums. *The Marquis of Camden* v. *Batterbury*, 864

BY-LAWS.

See RAILWAY COMPANY, 2, 3.

CANONS OF 1603.

How far binding,—See QUARE IMPEDIT.

CERTIFIED COPY.

See EVIDENCE, 1.

COMMON LAW PROCEDURE ACT, 1852.

SECTION 17,—*Leave to proceed as upon personal service*, 829.

SECTION 55,—*Profert and oyer*, 816.

COMPANIES CLAUSES CONSOLIDATION ACT.

See JOINT STOCK COMPANY, 1, 2.

COMPOSITION PAPER.

See WATER-RATE.

CONDITION PRECEDENT.

What amounts to.

The declaration alleged, that, in consideration that the plaintiff guarantied to the defendant that two bills of exchange of 100*l.* and 62*l.*, drawn by A. & Co. upon B. & Co., and both due on the 23d of January, 1859, would be paid by B. & Co. when due, the defen-

ant, in return, guarantied to the plaintiff the repayment of 300*l.* towards the payment of goods which C. had ordered and was about to receive from the plaintiff. It then averred a general performance of all conditions precedent by the plaintiff, that the two bills were duly paid by B. & Co. when due, that the goods were delivered to C., and that C. had failed to pay for them; and assigned for breach non-payment of the 300*l.* or any part thereof by the defendant.

Plea, that, although the said sum of 300*l.*, repayment whereof the defendant guarantied to the plaintiff, was not by the terms of C.'s order payable until after the two bills became due, as the plaintiff and defendant at the time of the making of the mutual agreement and guarantees well knew; yet the said two bills were not duly or at any time paid by B. & Co., of which the plaintiff had due notice, but never at any time paid or retired the said bills:—

Held, on motion for judgment non obstante veredicto, that the performance of the plaintiff's promise to pay the two bills was not a condition precedent to his right to sue the defendant for non-payment of the 300*l.*, and consequently that the plea was no answer. *Christie* v. *Borelly*, 561

CONSPIRACY.

To procure Plaintiff to be prosecuted upon an unfounded Charge.

The declaration stated that the plaintiff was possessed of certain messuages and premises; that the defendant and one S. unlawfully and maliciously conspired to procure possession of a portion of the premises, and to set up and keep private stills thereon; that, in pursuance of such conspiracy, they, by falsely pretending and representing to the plaintiff that S. wanted such portion of the premises for the carrying on therein of a lawful trade, induced the plaintiff to demise them to him; that, in further pursuance of such conspiracy, the defendant and S. entered and took possession of the premises and set up concealed stills therein, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who had so set up such stills and was the proprietor thereof; that the defendant and S. worked the stills, and falsely and maliciously pretended and represented, and by divers false and fraudulent means and devices made it appear and be believed that it was the plaintiff who so used the stills; and that, by means and in consequence thereof, an excise officer entered, and, finding the plaintiff upon the premises, took him before a magistrate, who convicted him of keeping illlicit stills:—

Held, that the declaration disclosed no cause of action,—the damage to the plaintiff not appearing to have been the natural and proximate consequence of the defendant's act. *Barber* v. *Lesiter*, 175

CONTINGENT LIABILITY.

See BANKRUPT, 1.

CONTRACT.

Construction of Mercantile Contract.

The defendants contracted to buy of the plaintiff "115 bales, containing 18,440 (or any less number that may arrive) East India hides, shipped per Ontario, Calcutta to Hamburgh, and to be delivered in London, at 11½*d.* per lb. round, but the wrappers to be charged at 8*d.* per lb." The ship having been compelled by stress of weather to put back to Calcutta, 18 of the bales were found to be damaged, and were sold. The remaining 97 bales arrived, but the defendants refused to accept them:—Held, on appeal,—affirming the judgment of the court below,—that the words "or any less number that may arrive," applied to the number of *bales*, and not merely to the number of *hides*, and consequently that the defendants were liable for not accepting the 97 bales. *Beckh* v. *Page*, 861

And see EVIDENCE, 2.

COPYHOLD.

Admittance out of Court.

1. An admittance (previous to the 4 & 5 Vict. c. 35) by the steward of a manor, as such, out of the manor, whether at a court or otherwise, was bad. But, as such an admittance would have been good if a special authority for that purpose had been given by the lord, so also it might have been rendered valid by his subsequent ratification and notification to the homage, so as to make it an admittance by implication. *Doe d. Gutteridge* v. *Sowerby*, 599
2. A. was in 1810 admitted, out of court, by the steward, to a copyhold, upon a surrender made in 1791, and paid a fine to the steward for the use of the lord. An informal entry of the admittance appeared on the court rolls; and the admittance was in subsequent entries treated as a valid admittance, and the property had been held for about thirty-five years, under it, and transmitted to purchasers:—Held, upon a special case, upon which the court were to draw inferences as a jury, that the admittance, though at first invalid, was rendered a good admittance by the subsequent ratification and adoption of the lord. *Id.*

COPYRIGHT.

Musical Composition.

The plaintiff declared, that, after the passing of the 3 & 4 W. 4, c. 15, and 5 & 6 Vict. c. 45, he had and still retained the sole liberty of representing and performing a certain musical composition composed by him for the purpose of being performed at and during and as part of the representation of Shakespeare's play of "Much ado about Nothing," and that the defendant without his consent caused the said musical composition to be performed and represented at his theatre, &c.

Plea, that the alleged musical composition was part of a dramatic piece, to wit, &c., adapted to the stage by the defendant with the aid of scenery, dresses, the alleged composition, and other music and accompaniments, the general design of which representation was formed by the defendant, and that the defendant employed the plaintiff for reward to compose the said musical composition as part of the said representation and dramatic piece, and as a mere accessory thereto, on the terms, that, in consideration of such reward, the said musical composition should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, &c., the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof; and that the alleged musical composition was composed by the plaintiff under and by virtue of the said employment, and upon the terms and for the purpose aforesaid :—

Held, on demurrer, that the plea was a good answer to the declaration; for that, under the circumstances, the defendant was to be considered as the author or proprietor of the whole entertainment. *Hutton* v. *Kean*, 268

CORN-CRUSHER.

See FIXTURES.

CORPORATION.

Liability of, for intentional Misfeasance.

1. A corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. *Green* v. *The London General Omnibus Company (Limited)*, 290
2. Therefore, in an action against a company established for conveying passengers by omnibuses in the streets of London, charging that the company by its servants wrongfully, vexatiously, and maliciously did certain acts (describing them) with a view to, and which in the result did, obstruct and annoy the plaintiff in the conduct of a similar trade :—Held, that, as the acts complained of were connected with the object and purpose for which the company was incorporated, the company was responsible. *Green* v. *The London General Omnibus Company (Limited)*, 290

CORPORATION SOLE.

See ECCLESIASTICAL LAW.

COSTS.

Certificate under 13 & 14 Vict. c. 61, s. 12.

1. The 3 & 4 Vict. c. 24, s. 2, is not repealed by the 13 & 14 Vict. c. 61, ss. 11, 12. Therefore, where, in an action of tort, the plaintiff recovered less than 40*s.* damages,—Held, that a certificate under the 12th section of the last-mentioned act, that it appeared to the judge at the trial that there was a sufficient reason for bringing the action in the superior court, did not entitle him to recover costs. *Powle* v. *Gandy*, 556

Reference before Trial, Costs to abide the Event.

2. A cause was referred by judge's order before verdict,—*the costs of the cause and of the reference and award to abide the event :* the arbitrator found for the plaintiff on certain issues, damages 12*l.* 12*s.*, and that there was due to the defendant on a plea of set-off 9*l.* 7*s.* 9*d.* : and he awarded that the defendant should forthwith pay to the plaintiff the balance of 3*l.* 4*s.* 3*d.* :—Held, that the event of the cause being in favour of the plaintiff, he was entitled to the costs. *Jones* v. *Jones*, 832

Delivery of Bill.

3. The plaintiff having obtained judgment in ejectment, and executed a writ of possession, —Held, that the defendant was entitled to call upon him to deliver a bill of costs. *Baker* v. *Saunders*, 858

COUNTY COURT.

Certificate under 13 & 14 Vict. c. 61, ss. 11, 12.—

See COSTS, 1.

DAMAGES.

Measure of.

1. In an action for a breach of warranty on the sale of goods which the buyer has sold again,—Held, that the proper measure of damages was, the difference between the real market value at the time of the sale and the contract price. *Dingle* v. *Hare*, 145
2. *Quære*, whether the buyer might not have been entitled to recover a sum fairly and reasonably paid by him as compensation to a third person to whom he had upon the faith of the defendant's warranty sold a portion of the goods ? *Id.*
3. *Costs of action.*]—A., a broker, contracted with B. for the purchase (on behalf of C.) of

certain goods. C. refusing to accept the goods, B. sued A. for the breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a prudent and reasonable man would have done in his own case. The jury having found for the plaintiff,—Held, that A. was entitled to recover the costs. *Broom* v. *Hall*, 503

4. *Where sufficiently proximate,—See* CONSPIRACY.

DEFAMATION.

Special Damage.

1. The plaintiff brought an action for speaking these words,—"Your house is a bawdy-house, and no respectable people will live in it." The words proved were addressed to the *plaintiff's wife*, and were as follows,—"You are a nuisance to live beside of. You are a bawd: and your house is no better than a bawdy-house:"—Held, that the words were actionable without special damage, and substantially supported the declaration. *Huckle* v. *Reynolds*, 114

2. In an action for verbal slander not actionable per se, the declaration alleged for special damage, that, in consequence of the speaking of the words, four of the plaintiff's customers had ceased to deal with him. Three of those persons proved only that they ceased to deal with the plaintiff in consequence of reports they had heard in the neighbourhood; but the fourth proved the speaking by the defendant of words substantially as charged, and stated that *he did not deal with the plaintiff afterwards*:—Held, some evidence of special damage. *Bateman* v. *Lyall*, 638

DILAPIDATIONS.

Liability of a Lay Vicar Choral in respect of,—See ECCLESIASTICAL LAW.

DRAMATIC ENTERTAINMENT.

See COPYRIGHT.

ECCLESIASTICAL LAW.

Rights and Liabilities of Vicars Choral.

1. A vicar choral of the cathedral church of Wells, in the county of Somerset, is a "corporation sole," and his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar choral. *Gleaves* v. *Parfitt*, 838

2. And, even if he were not strictly a "corporation sole,"—*Semble*, per Erle, C. J., that he still has such a sole estate in the house as to create the liability. *Gleaves* v. *Parfitt*, 838

See QUARE IMPEDIT.

ESCAPE.

See SHERIFF.

ESTOPPEL.

See INSURANCE.

EVIDENCE.

Public Documents.

1. By-laws duly made by a railway company pursuant to the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 108–111, and confirmed and allowed as by law required, are "public documents," a certified copy of which is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14. *Motteram*, app., *The Eastern Counties Railway Company*, resp., 58

To explain a Written Document.

2. The plaintiffs, lace-merchants, carrying on business by means of travellers over certain districts in England, verbally agreed with the defendant, who was already in their service in another capacity, to travel for them over one of the districts, which they designated the "midland district," it being at the time understood that the terms of the engagement were to be reduced into writing. A few weeks after the defendant had started on the journey, the following agreement was sent to him, and he signed and returned it:—"To H. & W. Mumford,—In consideration of my entering upon your employ at a salary to commence with at 50*l.* a year, I herewith agree to do so, with the understanding, that in the event of my wishing to travel, and doing so, for any other house in the same trade, on any part of the same ground, to pay you the sum of 50*l.*:"—

Held, that intrinsic evidence was properly admitted to explain the nature of the employment, and what was intended by the expression "the same ground;" that, such evidence being admitted (or, per Erle, C. J., and Crowder, J.,—Byles, J., dubitante,—without it), the contract was not void as an unreasonable restraint of trade; that, even without the evidence to explain the contract, there was ample consideration for the defendant's promise; and that a forfeiture of the 50*l.* was incurred by the defendant's travelling for another house in the same line "over the same ground," *after he had left the service of the plaintiffs*. *Mumford* v. *Gething*, 305

Want of Insufficiency of Stamp.

3. An objection to the admissibility of a document for the want or insufficiency of the

stamp, must be taken at the time it is tendered in evidence. *Robinson* v. *Lord Vernon*, 235

EXPULSION.

See LANDLORD AND TENANT.

FALSE REPRESENTATION.

Action for, where maintainable.

No action will lie for a false representation, unless the party making it knows it to be untrue, and makes it with the intention of inducing the plaintiff to act upon it, and the latter does so act upon it and sustains damage in consequence. *Behn* v. *Kemble*, 260

And see CONSPIRACY.

FELONY.

See PUBLIC RESORT.

FIXTURES

Annexed to the Freehold.

1. Where the owner of the inheritance annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold. *Walmsley* v. *Milne*, 115

2 A., the owner of land, in 1853 mortgaged it in fee to B., and afterwards erected certain buildings thereon, to which, for the more convenient use of the premises in his business of an innkeeper, brewer, and bath-proprietor, he affixed a steam-engine and boiler, a hay-cutter, a malt-mill or corn-crusher, and a pair of grinding-stones. The lower grinding-stone was boxed on to the floor of part of the premises, by means of a frame screwed thereto, the upper one being fixed in the usual way; and the steam-engine and other articles (except the boiler) were fastened by means of bolts and nuts to the walls or the floors for the purpose of steadying them, *but were all capable of being removed without injury either to themselves or to the premises.* The engine was used to supply water to the baths and to put the other machines in motion; and the whole were subservient to the business carried on by A.

A. continued in possession until 1858, when he became bankrupt:—Held, that his assignees were not entitled to claim these fixtures, but that they passed to the assignee of the mortgagee as part of the freehold. *Id.*

FORGERY.

See BILL OF EXCHANGE, 4. JOINT STOCK COMPANY, 3.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREIGHT.

Assignment of,—See SHIPPING.

GAME.

Trespass in Pursuit of.

1. One H., the tenant of a farm the right of sporting over which was reserved to the landlord (the tenant also having permission to sport over the farm), authorized one of his labourers to shoot a rabbit for the purpose of giving it to his (the labourer's) wife, who was ill. The justices having decided, upon a complaint under the 1 & 2 W. 4, c. 32, s. 30, for a trespass in pursuit of conies that the labourer was acting by the order of his master,—The court, upon appeal, affirmed their decision. *Padwick*, app., *King*, resp., 88

2. A complaint of trespass in pursuit of game, under the statute 1 & 2 W. 4, c. 32, s. 30, need not be made by a person having an interest in the land. *Morden*, app., *Porter*, resp., 641

3. The leave and license of the occupier, to be an answer to such complaint, must precede the act of trespass. *Id.*

4. And, *semble*, per Williams, J.,—Keating, J., dubitante,—that the party trespassing is not the less guilty of the offence because he bonâ fide *believes* that he has the license of the occupier to shoot over the land. *Id.*

GRINDING-STONES.

See FIXTURES.

GUARANTEE.

Consideration.

1. Since the 19 & 20 Vict. c. 19, s. 3, though parol evidence may supply the consideration for a guarantee, it cannot be admitted to explain the promise. *Holmes* v. *Mitchell*, 361

2. In a letter written by the defendant to the plaintiff, relating to a proposed mortgage, the following words are not a sufficient guarantee within the 4th section of the Statute of Frauds,—"I will take any responsibility myself respecting it, should there be any." *Id.*

And see CONDITION PRECEDENT.

HAY-CUTTER.

See FIXTURES.

HUSBAND AND WIFE.

Acknowledgment of Deed by the Wife.

A certificate of acknowledgment of a deed by a married woman under the 3 & 4 W. 4, c. 74, was allowed to be filed, where, in lieu of the form given in s. 84, the commissioners

merely certified that the lady was, *as they believed*, of full age, &c. *Ex parte Elizabeth Maria Wallis* and *Ex parte Ann Juliet Hay*, 303

INSPECTION OF DOCUMENTS.

Where allowed.

Since the Common Law Procedure Act, 1852 (s. 55), abolishing profert, the court will order inspection of a deed relied on by a defendant in his plea, though it be a disclosure of the defendant's title.

Therefore, where, in an action for diverting water from a stream, the defendants pleaded a prior grant by the owners of the soil of liberty to take the water, the court allowed the plaintiffs to inspect and take a copy of the deed. *The Penarth Harbour, &c., Company* v. *The Cardiff Waterworks Company*, 316

INSURANCE.

Usage of Lloyd's.

The plaintiff, a ship-builder in London, employed one W., an insurance-broker, to effect a policy upon a ship at Lloyd's, and, after the happening of a loss, gave W. the ship's papers for the purpose of enabling him to adjust the loss with the underwriters. The policy was effected in W.'s name, and he had retained possession of it. An adjustment having taken place, the loss was settled,—in accordance with a usage prevailing at Lloyd's, which was found to be generally known to merchants and shipowners, but which the jury found was not known *to the plaintiff*, who had merely left the policy in W.'s hands for safe custody,—by the underwriter setting off the amount payable by him upon the policy against the balance due to him from the broker for premiums on other policies effected by him:—

Held, that, although the plaintiff was estopped from denying that the broker had authority to receive the amount due from the underwriter on the policy *in money*, he was not bound by the usage, and, consequently, that he was entitled to recover the amount of the policy against the underwriter, notwithstanding such settlement. *Sweeting* v. *Pearce*, 449

JERVIS'S ACT.

See PUBLIC HEALTH ACT, 1848.

JOINT STOCK BANK.

Right of Manager to sue upon Securities of,—See BILL OF EXCHANGE, 1, 2.

JOINT STOCK COMPANY.

What constitutes a Shareholder within the 8 & 9 Vict. c. 16.

1. The mere placing the name of a party with others as shareholders of a company on a sheet of paper, and sealing it, and calling it a register of shareholders, no shares being numbered or specifically appropriated, and none of the essentials required by the 8 & 9 Vict. c. 16 being complied with, does not constitute sufficient evidence under the 27th section, of the parties being shareholders. *The Wolverhampton New Waterworks Company* v. *Hawkesford*, 795

2. The time within which by the 9th section of the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) a register of shareholders is to be made, is merely directory; and a register containing the particulars required by the act, and bonâ fide intended to be a register, may be valid though made at a subsequent period. *Id.*

Rectification of Register of Shareholders.

3. A holder of shares in a joint stock company, by intrusting his broker with blank transfers signed by him, and affording him an opportunity of obtaining access to a box containing the certificates for the shares, enabled him by forgery and fraud to induce the company to register the transfers of the shares in the names of bonâ fide purchasers. A motion under the 19 & 20 Vict. c. 47, s. 25, and 20 & 21 Vict. c. 14, ss. 8, 9, to rectify the register by replacing thereon the name of the original shareholder, failed; the court being equally divided,—Erle, C. J., and Keating, J., holding that the applicant had precluded himself by his negligence from availing himself of the equitable jurisdiction of the court under the statutes; Willes, J., and Byles, J., holding that the property in the shares had not been changed by the forged transfers. *In the matter of the North British Australasian Company (Limited) and The Joint Stock Companies Acts, 1856 and 1857,—Ex parte Swan*, 404

JUDGE'S ORDER.

See TIME.

JUSTICES.

Appeals under 20 & 21 Vict. c. 43.

Upon the argument of a case stated by justices under the 20 & 21 Vict. c. 43, no objection can be relied upon which was not taken before the justices. *Motteram*, app., *The Eastern Counties Railway Company*, resp., 58

JUSTIFICATION.

See LIBEL.

LANDLORD AND TENANT.

Determination of Tenancy at Will.

Pending a negotiation for an assignment of a lease, A. was (as the jury found) let into possession of the premises as tenant of some kind. The negotiation going off, B. (the land-

lord) demanded the key, and wrote to A. telling him that he never intended to let him into possession at all, and, A. refusing to go out, B. entered and forcibly expelled him and his family, in the doing of which the plaintiff and his wife were assaulted:—Held, that, although the plaintiff was entitled to recover damages for the assaults, he was not entitled to damages for the expulsion,—his tenancy being at the most a tenancy at will, and that having been properly determined. *Pollen* v. *Brewer*, 371

LEAVE AND LICENSE.

To shoot,—See GAME, 3.

LETTERS PATENT.

Assignment of Part.

It is competent to the assignee of a separate and distinct portion of a patent to sue for an infringement of that part, without joining one who has an interest in another part, —the damages to be recovered in the action accruing to the former alone. *Dunnicliff* v. *Mallet*, 209

LIBEL.

General Justification.

To a declaration containing three counts for distinct libels, the court refused to allow the defendant to plead one general plea of justification. *Howes* v. *Stubbs*, 555

LIVERPOOL WATERWORKS ACT.

See WATER-RATE.

LLOYD'S.

See INSURANCE.

MALICIOUS PROSECUTION.

In an action for maliciously and without reasonable or probable cause going before a magistrate and procuring the plaintiff to be held to bail to keep the peace, it is not necessary,—as in the ordinary case of an action for a malicious prosecution,—to aver that the proceeding before the magistrate was determined in favour of the plaintiff; such a proceeding being ex parte, and the truth of the statement made by the applicant to the magistrate not being controvertible. *Steward* v. *Gromett*, 191

And see CONSPIRACY.

MALT-MILL.

See FIXTURES.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

Judges.

Death of Crowder, J., 506
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MESSENGER'S FEES.

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METROPOLITAN BUILDING ACT.

Contract in contravention of.

1. A contract for the erection of a building in contravention of the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122, cannot be enforced. *Stevens* v. *Gourley*, 99
2. A structure of wood, of considerable size (16 feet by 13), and intended to be permanently used as a shop, is a "building" within the 18 & 19 Vict. c. 122, although not let into the ground, but merely laid upon timbers upon the surface. *Id.*

MISDIRECTION.

N., representing himself to be the proprietor of a certain business carried on under the name of The Continental Wine Company, induced the defendants to receive from him certain wines and spirits in part satisfaction of a debt previously contracted by him with them. N. was in truth only clerk to R., who was the real proprietor of the establishment. The name of R. appeared over the entrance to the cellar, but it was not visible to persons going to the counting-house. R.'s name also appeared (though in an ambiguous manner) upon a receipt signed by one of the defendants on the delivery of some of the goods.

In an action brought by R. for the price of the goods, it was left to the jury simply to say whether R. or N. was the real proprietor of the business:—Held, a misdirection,—the proper question being whether R. had so conducted himself as to enable N. to hold himself out as the proprietor, and whether the defendants dealt with him upon that footing. *Ramazotti* v. *Bowring*, 851

MISFEASANCE.

See CORPORATION.

MORTGAGE.

Of Freight and Passage Money,—see SHIPPING, 2.

MUSICAL COMPOSITION.

See COPYRIGHT.

NEGLIGENCE.

Obligation to fence a dangerous Pit.

1. An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near to a public road or way as to constitute a public nuisance. *Hounsell* v. *Smyth*, 731

2. A declaration stated that the defendants were seised of certain waste land upon which was a quarry that was worked by certain persons subject to the payment of certain royalties to the defendants; that the waste land upon which the quarry was situate was unenclosed and open to the public, *and that all persons having occasion to pass over the waste had been used and accustomed to go upon and across the same without interruption or hindrance from and with the license and permission of the owners of the waste;* and the quarry was situate near to and between two public highways leading over the waste, and was precipitous, &c., and dangerous to persons who might accidentally deviate or stray, or who might have occasion to cross over the waste for the purpose of passing from one of such roads to the other beside or near the quarry; that the defendants, knowing the premises, negligently and contrary to their duty left the quarry unfenced, and took no care and used no means for protecting the public or any person so accidentally deviating from the said roads, or passing over the waste, from falling into the quarry; and that the plaintiff, having occasion to pass along one of the said roads, and having by reason of the darkness of the night accidentally taken the wrong road, was crossing the waste for the purpose of getting into the other, and, not being aware of the existence or locality of the quarry, and being unable by reason of the darkness to perceive the same, fell in and was injured:—Held, that the declaration disclosed no legal ground of complaint. *Id.*

And see JOINT STOCK COMPANY, 2. RAILWAY COMPANY, 1.

NEW TRIAL.

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NOTICE OF TRIAL.

Service of,—see PRACTICE, 2.

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PASSAGE-MONEY.

Assignment of,—See SHIPPING, 2.

PATENT.

See LETTERS PATENT.

PIRACY.

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PLEADING.

Declaration for maliciously holding to Bail.

1. In an action for maliciously and without reasonable or probable cause going before a magistrate and procuring the plaintiff to be held to bail to keep the peace, it is not necessary,—as in the ordinary case of an action for a malicious prosecution,—to aver that the proceeding before the magistrate was determined in favour of the plaintiff, such a proceeding being ex parte, and the truth of the statement made by the applicant to the magistrate not being controvertible. *Steward* v. *Gromett*, 191

Libel.

2. To a declaration containing three counts for three distinct libels, the court refused to allow the defendant to plead one general plea of justification. *Heneee* v. *Stubbs*, 565

POWER OF ATTORNEY.

See SHIPPING, 2.

PRACTICE.

Leave to proceed.

1. To entitle a plaintiff to an order for leave to proceed as if personal service had been effected, under the 17th section of the 15 & 16 Vict. c. 76, where the writ has been served by leaving a copy for him at a club-house of which the defendant is a member, it is not enough to show that the copy has come in to his hands. The affidavit should distinctly state that efforts had been made to discover the defendant's place of abode, and that the person seeking to serve the writ had been unable to discover it. *Davies* v. *Westmacott*, 829

Service of Notices and Rules.

2. Service of a notice or rule by putting it under the door of the attorney's office, is not good service, without some evidence that it has duly come to hand. *Burdett* v. *Lewis*, 791

Changing the Venue.

3. The court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there be some great and obvious preponderance of convenience in trying the cause elsewhere.

Therefore, in an action for the breach of a warranty on a sale of horses at Liverpool, the court refused to change the venue from Middlesex to South Lancashire, upon affidavits stating that the defendant's witnesses resided at Liverpool and in Ireland, —the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid. *Durie* v. *Hopwood*, 835

Conduct of Trial.

4. A cause being called on at the Assizes, the plaintiff, in consequence of some misapprehension on his part as to the order in which the judge had proposed to take the list, was absent: the defendant was present with his counsel, and, after some delay, a nonsuit was entered. It being subsequently discovered that the jury had not been sworn, the judge (the defendant having gone away) directed that the entry of the nonsuit should be expunged, and the case struck out. Upon an application by the defendant for the costs of the day, the court,—thinking that both parties were in default,—directed that the costs of the day and of the motion should be costs in the cause. *Warne* v. *Hill*, 726

Staying Proceedings.

5. It is no ground for staying proceedings in an action here, that proceedings are pending between the parties for the same cause of action in the United States. *Cox* v. *Mitchell*, 55

Computation of Time,—see TIME.

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PRINCIPAL AND AGENT.

Authority of Agent,—see MISDIRECTION.

PRIVATE ROAD.

See ROAD.

PROFERT.

See INSPECTION OF DOCUMENTS.

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PROXIMATE DAMAGE.

See CONSPIRACY.

PUBLIC COMPANY.

Misfeasance by,—See CORPORATION.

PUBLIC DOCUMENTS.

See EVIDENCE, 1.

PUBLIC HEALTH ACT, 1848.

Time for making Complaint for Offences against.

1. By the 51st section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), the local board are empowered, on the owner's default after notice, to provide certain necessary house accommodations, the expense of which is to be recoverable in a summary manner from the owner, the amount to be ascertained by and recovered before two justices,—s. 129.

By the 11th section of Jervis's Act, 11 & 12 Vict. c. 43, in all cases where no time is specially limited for making or laying the complaint or information, it must be done within six calendar months from the time when the matter of complaint or information arose:—

Held, that a complaint under the Public Health Act, 1848, must be made within six calendar months of the work being done and notice of the amount due being given to the party, and not within six months of the demand of payment. *Eddleston*, app., *Francis*, resp., 568

2. *Quære*, whether a "receiver" appointed by the Court of Chancery is an "owner" within the 11 & 12 Vict. c. 63, s. 2? *Id.*

3. The provision in the 21 & 22 Vict. c. 98, s. 62, as to the time for taking proceedings by a local board for the recovery of expenses incurred under the Public Health Act, 1848 is prospective only. *Id*

PUBLIC NUISANCE.

See NEGLIGENCE.

PUBLIC RESORT.

Place of, within 5 G. 4, c. 83, s. 4.

A private house and garden where a sale by public auction takes place is for the time a "place of public resort" within the 5 G. 4, c. 83, s. 4. *Sewell*, app., *Taylor*, resp., 160

QUARE IMPEDIT.

Right of Bishop to Testimonials.

1. A bishop has no right to demand from the presentee of a benefice before he will institute him, a testimonial from the bishop of another diocese in which the party has had cure of souls, of his "honest conversation, ability, and conformity to the ecclesiastical laws of England." *Marshall* v. *The Bishop of Exeter*, 653

2. *Quære*, how far the Canons of 1603 are binding on the laity? *Id.*

3. *Semble*, that the 48th Canon of 1603 has no application to the institution of clerks to livings, but only to the service of cures and

in churches and chapels by curates and ministers who are not the incumbents. *Marshall* v. *The Bishop of Exeter*, 653

RAILWAY COMPANY.

Negligence of Servants.

1. A child three years and a half old strayed upon a railway and had its leg cut off by a passing train:—Held, that, in the absence of any evidence to show that the child got there through some neglect or default on the part of the company, they were not responsible for the injury. *Singleton* v. *The Eastern Counties Railway Company*, 287

Publication of By-Laws.

2. By-laws duly made by a railway company pursuant to the Railways Clauses Consolidation Act, 8 & 9 Vict. c. 20, ss. 108–111, and confirmed and allowed as by law required, are "public documents," a certified copy of which is admissible in evidence under the 14 & 15 Vict. c. 99, s. 14. *Motteram*, app., *The Eastern Counties Railway Company*, resp., 58

3. By the 109th section of the 8 & 9 Vict. c. 20, the company is empowered to make by-laws to enforce the observance of its regulations by means of fines; and the 110th section requires that the substance of such by-laws, when confirmed and allowed, "shall be painted on boards, or printed on paper and pasted on boards, and hung up and affixed and continued on the front or other conspicuous part of *every wharf or station belonging to the company*, according to the nature or subject-matter of such by-laws respectively, and so as to give public notice thereof to the parties interested therein or affected thereby; and such boards shall from time to time be renewed, &c.; and no penalty imposed by any such by-law shall be recoverable unless the same shall have been published and kept published in manner aforesaid." And s. 111 enacts, that, "for proof of the publication of any such by-laws, it shall be sufficient to prove that a printed paper or painted board, containing a copy of such by-laws, was affixed and continued in manner by this act directed," &c.

A by-law imposed a penalty not exceeding 40*s.* upon a passenger getting into or out of a carriage whilst in motion. Upon a summons before justices for a breach of this by-law:—Held,—dissentiente Williams, J.,—that it was sufficient to show that the by-laws were affixed at the stations at which the party entered and quitted the train, without showing publication at every station on the line. *Id.*

Proceedings under the Railway Traffic Act, 1854, 17 & 18 *Vict.* c. 31.

4. Decision in Nicholson v. The Great Western Railway Company, 5 C. B. N. S. 369 (E. C. L. R. vol. 94), reviewed and upheld. *In re Nicholson and The Great Western Railway Company*, 755

RATIFICATION.

See COPYHOLD.

RECEIVER.

See PUBLIC HEALTH ACT, 1848, 3.

REFERENCE.

See ARBITRAMENT.

REGISTER.

See JOINT STOCK COMPANY, 3.

RELEASE.

Obtained by Fraud.

An action was brought in a county court in the names of A. and B., as executors of C., in respect of a claim accruing to the testatrix. B. executed a release the day before the trial. The counsel for the plaintiffs (upon whom the release came by surprise) proposed to call B. and to examine him as to the circumstances under which he had executed the release, for the purpose, as he said, of eliciting from him whether or not it had been fraudulently obtained, but without alleging the existence of fraud in fact. The judge refused to permit B. to be examined for that purpose, and the plaintiffs were nonsuited. This court, on appeal, set aside the nonsuit, with costs. *Robinson* v. *Lord Vernon*, 231

RENT.

See BUILDING AGREEMENT.

RESTRAINT OF TRADE.

See EVIDENCE, 2.

ROAD.

Presumption of Ownership.

The presumption that the soil of a road usque ad medium filum viæ belongs to the owners of the adjoining lands, applies equally to a private as to a public road. *Holmes* v. *Bellingham*, 329

RULE.

Service of,—See PRACTICE, 2.

SALE OF GOODS.

What amounts to Delivery.

A. sold goods to B., to be delivered "free on board" at Liverpool, for Trieste. The goods were placed by A. on board a steamer, *to be*

delivered to the order of B. By the custom of the trade, where goods are sold, to be delivered free on board, the price is not payable until production of a bill of lading or some other document giving evidence of their being on board. The owners of the steamer refusing to give out the bill of lading until a greatly increased amount of freight was paid, and B., when informed of that fact, declining to have anything to do with the matter, A. (who the jury found had not *contracted* to pay the freight) was unable to comply with the custom by producing the bill of lading:—Held, that B. by his conduct dispensed with the strict compliance with the custom, and that consequently A. was entitled to maintain an action for the price of the iron without producing a bill of lading. *Sichel* v. *Green*, 747

SEDUCTION.

Loss of Service.

1. To sustain an action for seduction, it is necessary to show something like the relation of master and servant, however slight the degree. *Manley* v. *Field*, 96
2. Where the daughter rented a house, and carried on the business of a milliner at the time of her seduction,—Held, that the circumstance of her mother and the younger branches of her family residing with her, and receiving part of their support from the proceeds of her business (the father lodging elsewhere), did not constitute such "services" as to entitle the father to maintain the action. *Id.*

SERVICE.

Of Rule,—See PRACTICE, 2.
Of Writ,—See PRACTICE, 1.

SHAREHOLDER.

See JOINT STOCK COMPANY.

SHERIFF.

Action for Escape on Execution.

An attorney having obtained judgment against B., at the suit of A., employed W., another attorney, to sue out execution. W. accordingly sued out a ca. sa. against B., under which he was taken in execution. B. prevailed upon the sheriff's officer to discharge him, upon his paying him the debt and costs, 45*l.* 2*s.* One F., a clerk of W. (with, as the jury found, W.'s concurrence), received 20*l.* of the money from the officer.

In an action against the sheriff for the voluntary escape, the defendant paid 25*l.* 5*s.* into court, and pleaded payment of the 20*l.*:—Held,—Byles, J., dissentiente,—that, the payment to F. being a payment to W., the defendant was entitled to a verdict,—the plaintiff having sustained no damages by reason of the escape, beyond the sum paid into court. *Hemming* v. *Hale*, 487

SHIPPING.

Authority of Agent at a Foreign Port.

1. An agent at a foreign port to whom a ship is addressed for loading under a charter-party, has no implied authority to vary the contract by substituting another and a distant port of loading, or a different quality or description of cargo. *Sickens* v. *Irving*, 165

Mortgage or Assignment of Freight and Passage-Money.

2. The owners of a ship gave a power of attorney authorising their agent to do many acts for them, and, among others, "to sign any bottomry-bond or instrument of hypothecation on the vessel or her cargo, and to sell and dispose of, either absolutely or by way of mortgage or otherwise as he should think proper, the said vessel, or any share thereof, and to execute all instruments, and to do all acts which should be requisite and necessary for completing such sales, transfers, mortgages, or any of them, and generally to do all acts about the business and affairs aforesaid which the owner, if present, could have done."

Under this power, the agent, by deed,—reciting a mortgage of the ship, and the necessity for further advance to enable the ship to set sail, and the advance of 4000*l.* for that purpose by the plaintiffs, assigned all the freight, hire, and passage-money, and earnings of the said ship in her intended voyage from Port Jackson to Liverpool, with a proviso for redemption if within ten days after arrival the 4000*l.* should be repaid. The ship sailed, and arrived at Liverpool; but the 4000*l.* was not paid.

After the ship had sailed, the agent of the owners received the passage-money of certain passengers by bills on England payable at sight, which bills were remitted to the owners in England, and the amounts received by them before the arrival of the ship:—Held, that the power of attorney authorized the assignment of the passage-money, and gave the mortgagees an immediate right to it before they took possession of the ship; and consequently that they were entitled to recover back the amount so received. *Willis* v. *Palmer*, 340

SLANDER.

See DEFAMATION.

STAMP.

Inadmissibility of Document for Want of.

An objection to the admissibility of a document for the want or insufficiency of the stamp,

must be taken at the time it is tendered in evidence. *Robinson* v. *Lord Vernon*, 235

STATUTE OF FRAUDS.

Contract within s. 4.

1. A., through the agency of B., a broker, sold a parcel of linseed to C., who through the same broker sold at an increased price to D. The time for D. to pay the price was to arrive before that fixed for the payment by C. D. sent a clerk to the broker for the delivery order for the seed. The broker took him to A., from whom the clerk obtained the order upon the faith of his engagement that D. would pay A. for the seed. D. on the following day sent the broker a check for 900*l.*, on account,—the precise quantity not having then been ascertained. Upon the seed being afterwards measured, it was found that the amount payable to A. under his contract with C. was 971*l.* 15*s.* 6*d.*

   In an action by A. against D. to recover the difference between that sum and the 900*l.* check:—Held, that the agreement by D.'s clerk was not a contract or promise to pay the debt of a third person within the 4th section of the Statute of Frauds, the seed, the giving up the delivery order for which was the consideration for that promise, being the property of D., subject only to A.'s lien for the contract price. *Fitzgerald* v. *Dressler*, 374

2. But held, by Williams, J., Crowder, J., and Willes, J. (Cockburn, C. J., dissenting), that, there being no evidence that D.'s clerk had communicated to him the bargain he had made with A.'s clerk when he obtained the delivery order, D. was not liable. *Id.*

3. In a letter written by the defendant to the plaintiff, relating to a proposed mortgage, the following words are not a sufficient guarantee within the 4th section of the Statute of Frauds,—"I will take any responsibility myself respecting it, should there be any." *Holmes* v. *Mitchell*, 361

STAYING PROCEEDINGS.

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TENANCY AT WILL.

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TENANCY FROM YEAR TO YEAR.

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TESTIMONIALS.

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TIME.

Computation of, on Judge's Order.

By a judge's order the debt and costs were to be paid by instalments of 2*l.* on the 25th of each month. The 25th happening to be a Sunday, the instalment was offered on Monday, and refused, and judgment was signed on the following day:—The court set aside the judgment, holding that the defendant had the whole of Monday to pay the money. *Morris* v. *Barrett*, 139

Limitation of,—see PUBLIC HEALTH ACT, 1848.

TRAFFIC ACT.

See RAILWAY COMPANY, 4.

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USURY.

Grant of Annuity.

The annual payments of an annuity (exceeding 5 per cent. on the sum advanced) were secured upon land, and the principal sum by a policy on the life of one of the grantors, with a covenant for payment of the annual premium:—Held, that the transaction was not usurious,—the principal being still placed in some degree of jeopardy. *Hawkins* v. *Bennett*, 507

VENUE.

Changing.

The court will not change the venue from the place where the plaintiff has thought fit to lay it, unless there be a great and obvious preponderance of convenience in trying the cause elsewhere.

   Therefore, in an action for the breach of a warranty on a sale of horses at Liverpool, the court refused to change the venue from Middlesex to South Lancashire, upon affidavits stating that the defendant's witnesses all resided at Liverpool and in Ireland,—the affidavits in answer stating that the plaintiff's witnesses, scientific men and others, all resided in or near to the place where the venue was originally laid. *Durie* v. *Hopwood*, 335

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WARRANTY.

On Sale of Goods.

1. In an action for a breach of warranty on the sale of goods which the buyer has sold again,—Held, that the proper measure of damages was, the difference between the real market value at the time of the sale and the contract price. *Dingle* v. *Hare*, 145
2. *Quære*, whether the buyer might not have been entitled to recover a sum fairly and reasonably paid by him as compensation to a third person to whom he had upon the faith of the defendant's warranty sold a portion of the goods? *Id.*

WATER-RATE.

Construction of Liverpool Water Works Acts, 1847, 1850.

1. By the Liverpool Corporation Water Works Act, 1847, 10 & 11 Vict. c. cclxi., the rates at which water is to be supplied for domestic purposes, are to be assessed upon the "annual value" of the premises: and by the 18th section of the Liverpool Corporation Water Works (Amendment) Act, 1850, 13 & 14 Vict. c. lxxx., it is enacted, that, if the owner of any dwelling-house the *yearly rent or value* whereof shall not amount to 13*l.*, or which, whatever may be the annual value thereof, shall be let to weekly or monthly tenants, or in separate apartments, shall be desirous of paying a reduced water-rent by the year for the same, whether occupied or not, the council may compound with such owner for the payment of the water-rents payable by virtue of the acts in respect of such dwelling-house at any sum not less than three-fourths of the annual water-rent for the same; and all such compositions shall be entered in the books of the Council, and shall be recoverable in like manner as the rents and charges authorized by the act are by law recoverable.

By a composition paper, the appellant, as the owner of certain dwelling-houses let to weekly tenants, agreed with the corporation to compound for the water-rates, and in a schedule thereto stated the "rental to be 4*s.* 6*d.* per week and 3*s.* 6*d.* per week respectively." The composition paper contained a stipulation, that, "if at any time it should be ascertained that the *rental* of such houses was not truly and correctly set forth in the schedule, the corporation might be at liberty to amend the same by inserting therein the true and correct amounts of such *rental*," and might recover against the appellant the additional water-rents due in respect thereof.

The rents of the houses were in point of fact 6*d.* per week respectively more than the sums stated in the schedule,—the appellant claiming to deduct that sum in respect of poor and other rates which by agreement with the tenants were paid by him:—

Held, that the appellant was not entitled to make such deduction, but that the corporation were entitled under the agreement to receive the composition on the amount of *rent* paid by the tenants. *Rook*, app., *The Mayor, Aldermen, and Burgesses of Liverpool*, resp., 240

2. Held, also, that the production of the composition paper, and proof that no demand of water-rates had been made upon the tenants, were sufficient evidence that the composition had been made, without showing that any entry thereof had been made in the books of the council. *Id.*

WITNESS.

Action for not Attending pursuant to Contract.

The declaration in an action for not attending as a witness, stated, that, in consideration that the plaintiff would retain and employ the defendant in his capacity of surgeon and apothecary to collect and prepare the medical and other evidence necessary and material to a suit which the plaintiff was about to institute in the Divorce Court, and to assist plaintiff in the management of the suit, and to attend and give evidence at the trial of the issues to be joined therein, for fees and reward in that behalf, the defendant promised the plaintiff to use due diligence, skill, and attention in and about collecting and preparing the evidence for the said suit, *and to appear and tender himself as a witness, and to give his testimony at the trial of the said issues*; and the breach alleged was, that the defendant did not appear at the trial of the said issues, or tender himself to be a witness thereat, but refused and neglected so to do; by reason whereof the plaintiff was obliged to withdraw the record, and incurred costs, &c. Plea, non assumpsit.

To prove the contract alleged, evidence was given that the defendant had been engaged by the plaintiff to take care of and to watch his wife, with a view to the obtaining of proof of her insanity at the time of marriage,—upon the terms of his being paid from time to time his travelling and other expenses out of pocket, and for his fees and loss of time at or immediately after the trial; and several letters of the defendant's were put in, wherein he stated that there was ample evidence to support the plaintiff's case, and advised him to go into court at once, and promised to attend the trial *on receiving a week's notice*. In consequence of the absence of the defendant when the

cause was called on for hearing, the plaintiff was obliged to withdraw the record.

The jury having found that there was a contract by the defendant to attend at the trial without a subpœna and without receiving conduct-money:—Held, that their finding was warranted by the evidence, and that the plaintiff was entitled to substantial damages, without showing that he would have succeeded in the Divorce Court with the aid of the defendant's evidence. *Yeoman* v. *Dempsey*, 628

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1. The "place of abode" of the objector in the notice of objection under the 7th section of the 6 & 7 Vict. c. 18, means that which is his actual place of abode at the time of signing the notice, and not that described in the register. *Melbourne*, app., *Greenfield*, resp., 1

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1. *Freehold of the clear yearly value of* 40*s.*]—A. and several other persons claimed to be registered for a county as the owners each of an undivided thirty-fifth share of freehold property producing a net rental sufficient to give to each of them 2*l.* 0*s.* 6*d.* per annum. This was reduced below 40*s.* to each owner by the allowance of a commission of 5*l.* a year to one of the thirty-five, who undertook the management of the property and the transmission to each of the others of his share. The revising barrister having found that "the allowance of such commission was, from the nature of the property, *necessary* for the collection of the rents,"—Held, that the court was bound by his finding, and therefore could not say that the claimants had freeholds of the clear yearly value of 40*s.* *Sherlock*, app., *Steward*, resp., 21

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4. *Rating.*]—*Semble*,—per Erle, C. J.,—that the occupier is sufficiently rated, though the name of the owner of the premises only appears in the rate, a blank being left for that of the occupier,—where the latter is the person *intended* to be rated. *Id.*

5. *Quære*, whether the *omission* of the occupier's name from the rate is an "inaccurate description," within the 75th section of the 6 & 7 Vict. c. 18? *Semble*, that it is not. *Id.*

6. *Premises severed after the letting.*]—Premises consisting of five closes of land, a barn and other buildings, of the annual value of 40*l.*, were let to A., as tenant from year to year, at the yearly rent of 40*l.* Prior to the last day of July, 1859, the landlord assigned his interest in the *barn and other buildings* to a third person, for the express purpose of depriving the tenant of the right of voting,—the premises retained by the landlord not being sufficient of themselves to confer a vote:—Held, that the requisitions of the 27th section of the 2 W. 4, c. 45, in respect of occupation "under the same landlord," had been substantially complied with, and that the severance of the reversion did not affect the tenant's right to be upon the register,—*the taking* from the same landlord of premises of sufficient value being the principal test relied on by the legislature. *Smerdon*, app., *Tucker*, resp., 37

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Severance of,—See QUALIFICATION, 2.

YEARLY VALUE.

Reduced below 40s. by Cost of Collection,—See QUALIFICATION, 1.

END OF VOL. VII.

FIG. 197